

The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity

Peter Margulies

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Legal Profession Commons](#), and the [National Security Commons](#)

Recommended Citation

Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 Md. L. Rev. 173 (2003)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol62/iss2/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

MARYLAND LAW REVIEW

VOLUME 62

2003

NUMBER 2

© Copyright Maryland Law Review, Inc. 2003

Articles

THE VIRTUES AND VICES OF SOLIDARITY: REGULATING THE ROLES OF LAWYERS FOR CLIENTS ACCUSED OF TERRORIST ACTIVITY

PETER MARGULIES*

INTRODUCTION

For American lawyers, solidarity with clients is both a virtue and vice. Finding some shared stake with a client is crucial, especially when the state has charged a client with a horrific crime. The attorney-client relationship, protected by both evidentiary privilege and the Sixth Amendment, depends on the development of a "relationship of trust."¹ In developing this bond, lawyers give life to the presumption of innocence and the entire structure of constitutional protections undergirding the criminal justice system.² Solidarity, however, is far from an unalloyed virtue. A lawyer who cultivates an unre-

* Professor of Law, Roger Williams University. B.A., Colgate University; J.D., Columbia Law School. I thank Bruce Green, Gerry Neuman, Dan Richman, Abbe Smith, Ian Weinstein, and David Zlotnick for their comments on an earlier draft.

1. See Laura Mansnerus, *Fine Line in Indictment: Defense vs. Complicity*, N.Y. TIMES, Apr. 11, 2002, at A23 (quoting indicted attorney Lynne Stewart). See generally Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-75 (1993) (discussing the defense lawyer's need for empathy with the accused in order to understand the client's needs).

2. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (discussing the importance of zealous and aggressive representation in criminal defense); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 20 HOFSTRA L. REV. 925 (2000) (same). But see William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1703-06 (1993) (arguing that canons of ethics should bar criminal defense lawyers from aggressively questioning witnesses that lawyers believe to a reasonable degree of certainty are telling the truth).

served solidarity may compromise her client's interests or become complicitous in ongoing crimes.³ To avoid these pitfalls, a lawyer must be reflective about solidarity and its risks. The stakes are highest for lawyers who represent clients accused of terrorist activity.⁴

The dilemma of solidarity figures prominently in the recent indictment of Lynne Stewart, an attorney for the convicted terrorist, Sheikh Omar Abdel Rahman.⁵ The Government charged Ms. Stewart with providing material support for a designated terrorist organization by allegedly facilitating communication regarding terrorist activities between Abdel Rahman and his organization, the Gama'a al-Islamiyya, or Islamic Group, and with defrauding and making false statements to the government regarding these communications.⁶ The prosecution of Lynne Stewart illustrates the shifting boundary between virtuous and problematic varieties of solidarity in an age of terrorism.

In this Article, I argue that solidarity with clients is not a unitary concept, but instead a concatenation of three sometimes conflicting stances—affective, positional, and operational solidarity. Affective solidarity encompasses the bonds of empathy and trust in the attorney-client relationship. Positional solidarity evokes the lawyer's commitment to a client's political, social, or economic goals. Operational solidarity locates the lawyer as enabler of the client's ongoing activities. Analyzing solidarity in this fashion clarifies the tensions always present in the lawyer's attempts at solidarity, and the special challenges raised when a lawyer represents a person or group accused of terrorist activity.

Special challenges arise because the terrorism context blurs the boundary between positional and operational solidarity. Consider a

3. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEAS OF THE LEGAL PROFESSION* 66-74 (1993) (discussing the necessity of both "sympathy" and "detachment" in legal representation and the dialectic between them). However, some feel that Kronman's individual rather than group basis for detachment privileges the status quo. Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1146-47 (1995) (reviewing MILNER S. BALLY, *THE WORD AND THE LAW* (1993) and KRONMAN, *supra*).

4. See Michael J. Glennon, *Terrorism and the Limits of Law*, WILSON Q., Spring 2002, at 12 (discussing reconciliation of the security and rule of law in terrorism cases).

5. See *United States v. Sattar*, Indictment, 02 Crim. 395 (S.D.N.Y. 2002) [hereinafter "Indictment"]. Commentators on the Stewart case have argued that it could have a chilling effect on defense lawyers. See, e.g., Nat Hentoff, *High Noon for Ashcroft, Stewart, and the Defense Bar*, VILLAGE VOICE, Apr. 23, 2002, at 29 (noting the possible impact of the Stewart case on the right to counsel). Stewart's attorney further argues that her client's constitutional right to an attorney has been violated by suspected monitoring of their conversations. Patricia Hurtado, *Sheik's Lawyer: Throw Out Case; Says Rights as Attorney Violated*, NEWSDAY, June 15, 2002, at A21.

6. Indictment at 9-10.

case in which a lawyer represents the leader of a group with a history of performing terrorist acts such as violence against civilians. In the terrorist context, statements by the lawyer on her client's behalf regarding violence by the organization's members may serve not as mere abstract advocacy, but as directives for action.⁷ The boundary between positional and operational solidarity is especially porous when the organization's agenda involves violence against broad groups classified by nationality, ethnicity, or religion.⁸ The lawyer's knowing aid in the communication of such mass terror authorizations is a form of operational solidarity properly regulated by both professional discipline and criminal law.

Applying this principle of lawyer accountability nevertheless creates a dilemma for democracy. Legal representation plays a crucial role in vindicating constitutional safeguards.⁹ In seeking to curb operational solidarity, the government can so weaken the protections of the criminal justice system that it imposes its own brand of insidious allegiance: solidarity with the state. Any approach to regulating solidarity must guard against this peril.

The Article is written in five parts. Part I maps the internal logics of affective, positional, and operational solidarity. It identifies positional allegiance as a fluid stance, sometimes motivating the lawyer to solidify the client's trust, but on other occasions prodding the lawyer to sell out the client's interests. Positional solidarity raises particular problems when the lawyer's position entails the endorsement of violence. Part II first traces government efforts to disrupt the solidarity of lawyers with clients accused of organized violence. The government has employed gag orders, disqualification, surveillance, and criminal prosecution to respond to attorney complicity, but has also

7. The threat of such action serves as the basis for the Department of Justice's authority to monitor attorney-client communications. See Bureau of Prisons, General Management and Administration, 28 C.F.R. § 501.3 (2002).

8. See *infra* notes 42, 128, 144 and accompanying text (discussing goals and methods of terrorist organizations, including Kach, a right-wing Israeli group that plans and executes attacks on Palestinians).

9. Government actions that chill lawyers' embrace of this role compound the pervasive problems caused by a lack of resources. See DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 62 (2000) (remarking that "[i]n this system, zealous advocacy is the exception, not the rule, and it is generally better to be rich and guilty than poor and innocent"); Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform*, 70 FORDHAM L. REV. 1729, 1729, 1731 (2002) (lamenting over the quality of poor defendants' attorneys and noting that Sixth Amendment case law reflects the notion that bad lawyering alters a case's outcome only in the rarest of circumstances). For a discussion of strategies used by public defenders to cope with resource scarcity, see Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996).

used such methods to target lawyers for unpopular clients. This Part also outlines the Government's allegations against attorney Lynne Stewart, who is accused of complicity linked to her representation of today's archetypal unpopular client: a convicted terrorist.

Part III focuses on the need to regulate the troubled border between positional and operational solidarity, exemplified in the signaling of authorizations for mass terror at issue in the Stewart case. Part IV analyzes three pressing legal issues in such regulation: the validity and application of the prohibitions on material support for designated terrorist organizations in the Antiterrorism and Effective Death Penalty Act (AEDPA); the legality of restraints, including monitoring, on lawyers' communication with clients accused or convicted of terrorism offenses; and, the admissibility of lawyers' prior statements of support for violence. This Part suggests ways in which courts can ensure that regulation is effective in deterring lawyers' complicity and consistent with the First Amendment, due process, and right to counsel protections that preserve democracy. Finally, Part V suggests factors to guide prosecutorial discretion in regulating lawyers' roles and suggests that nuanced regulation may actually enhance the professional judgment lawyers offer to unpopular clients.

I. SOLIDARITY AND ITS DISCONTENTS

Solidarity with clients has always been an attribute looked upon with some ambivalence by the bench and bar. On the one hand, the legal system looks askance at lawyers who expressly or inadvertently separate themselves from their clients.¹⁰ Venerable rules like the duty of confidentiality exert a continuing hold because the profession views them as necessary to promote clients' trust.¹¹ Lawyers who manifest a

10. See L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. REV. 707, 713 (1994) (noting that attorneys collectively think that their responsibility is to their client rather than the "legal system" or the "public at large"); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1054 (1995) (remarking that lawyers who distance themselves from unpopular clients risk reinforcing a negative perception of their client); Frederic Dannen, *Defending the Mafia*, NEW YORKER, Feb. 21, 1994, at 64 (reporting that a lawyer who represents alleged organized crime figures, socializes with his clients to avoid reinforcing the belief that they are subhuman).

11. See MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1969) (stating that the client must feel free to discuss whatever the client wishes with the lawyer, and the lawyer must feel free to obtain information beyond that voluntarily supplied by the client); *id.* (stating that the ethical duty of confidentiality facilitates the full development of facts essential to proper representation and encourages laymen to seek early legal assistance); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983) (stating that lawyer-client confidentiality encourages clients to "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter"). The Canons found in the Model Code express in gen-

flagrant lack of interest in whether their client lives or dies—such as the Texas lawyer who repeatedly fell asleep during his client's trial for murder—trigger professional obloquy, public disdain, and judicial intervention on their client's behalf.¹²

On the other hand, the American legal tradition has also viewed an excess of solidarity with suspicion. Perhaps the classic illustration of American lawyers' detachment is by Alexis de Tocqueville, who described lawyers as a mediating force between the populace and elites, never fully in either camp, and able to distill the common interests of each.¹³ Professional canons expressly reject the attribution of solidarity with client aims or objectives, primly advising that, "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."¹⁴

eral terms the standards of professional conduct expected of lawyers, and embody the general concepts from which the Disciplinary Rules and Ethical Considerations are derived. MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement (1969). The Disciplinary Rules are mandatory in nature and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *Id.* The Ethical Considerations are aspirational in character, represent the objectives toward which lawyers should strive, and provide guidance to lawyers in specific situations. *Id.* The Model Rules are mandatory, and failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. MODEL RULES OF PROF'L CONDUCT, Scope (1983). Recent proposals seek to allow the attorney more discretion to reveal privileged communications. Nancy J. Moore, "In the Interests of Justice": *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1776 (2002) (discussing proposals to amend Model Rule 1.6 of the Rules of Professional Conduct to allow disclosure of otherwise confidential information to prevent "reasonably certain" death or substantial bodily harm).

12. See *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (en banc) (holding that a lawyer's sleeping during trial effectively deprived defendant of counsel in violation of the Sixth Amendment), *cert. denied*, 122 S. Ct. 2347 (2002).

13. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 266-70 (J.P. Meyer ed. & George Lawrence trans., Anchor Books 1969) (1835). For further discussion of the lawyer's role in American society, see generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (analyzing the imagery and underlying narratives of American constitutionalism); DAVID RAY PAPKE, *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH* 17-19 (1998) (discussing de Tocqueville's analysis); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991) (discussing narratives undergirding the lawyer's role in American democracy); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217 (2002) (discussing conceptions of professionalism in the practice of law).

14. See Ogletree, *supra* note 1, at 1249 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(b)). One commentator defends this premise of lawyerly detachment in the following way:

[I]f advocates were held morally accountable for their clients' conduct, less legal representation would be available for those most vulnerable to popular prejudice and governmental repression. Our history provides ample illustrations of the social and economic penalties directed at attorneys with unpopular clients. It was difficult enough to find lawyers for accused communists in the McCarthy era and

Lawyers who identified themselves with social movements have been the subject of ethics complaints charging them with solicitation¹⁵ and scholarly criticism asserting that they imposed a legalistic model unsuited to the diverse needs of communities.¹⁶ A cottage industry has developed for casting aspersions on lawyers who share a stake in their client's financial prospects through acquisition of a contingency interest in the client's recovery.¹⁷ At the same time, progressive critics of the profession have remonstrated with corporate lawyers for failing to assert sufficient independence from their clients' avarice.¹⁸

In the face of this ambivalence, three conceptions of attorney-client solidarity have emerged: affective, positional, and operational. Legal practice based on a conception of solidarity can benefit clients. However, the lawyer's failure to critically examine her practice of soli-

for political activists in the early southern civil rights campaign. Those difficulties would have been far greater without the principle that legal representation is not an endorsement of client conduct.

RHODE, *supra* note 9, at 54 (endnote omitted). Of course, a spectrum of views exist regarding an attorney's feelings and conduct towards a client's morality. See Peter Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 214 (1990) (arguing that lawyers are obliged to counsel clients on issues of morality and on the interests of third parties and the public); Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 FORDHAM L. REV. 1805, 1808-09 (2002) (arguing that lawyers should accept the challenge of moral accountability for clients' actions); Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659, 690 (2002) (arguing for a contextual approach in which facts of particular cases dictate when a lawyer defers to a client out of concern for client autonomy or intervenes to protect against harsh consequences of client decisions for third parties).

15. See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 L. & HIST. REV. 97, 131-44 (2002) (discussing the ethical troubles of early NAACP lawyers and the ways in which some leaders of the New York Bar modified their views on solicitation and other issues to accommodate the "cause lawyering" of pioneering civil rights lawyers).

16. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976) (arguing that the civil rights attorneys' "integrational ideals" may not best serve the needs of their clients); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1936 (1999) (asserting that a "client community" should reject "regnant lawyers" that "attempt impact litigation, legislative or administrative advocacy, base-building and mobilization, or other aspects of lawyering that extend beyond resolving private disputes").

17. See, e.g., Philip J. Havers, Student Article, *Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 621, 625-31 (2000) (evaluating the ethical questions plaguing contingency fee arrangements). But see CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 8 (2001) (arguing that contingency fee arrangements help promote social change by increasing access to counsel in cases to hold corporations accountable).

18. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 4 (1988) (quoting the former Chairman of the Securities and Exchange Commission urging the bar to emphasize independence from corporate clients).

darity can also adversely affect her client and the public interest. I discuss each brand of solidarity in turn.

A. *Affective Solidarity*

The legal system rightly values the lawyer's seeking to establish an emotional bond with a client. This kind of connection has both intrinsic and instrumental justifications. It requires the exercise of moral imagination, empathy, experience, and metaphor in an effort that both acknowledges and transcends human uniqueness.¹⁹ Connection of this kind offers the client a refuge from the uncertainty or disdain that she encounters elsewhere in the legal system.²⁰ Moreover, connection promotes the client's disclosure of information that will aid the lawyer in preparation of the case.²¹ We can call this connection "affective solidarity."

A lawyer displays a special strand of moral imagination when she cultivates affective solidarity with a defendant charged with offenses that truly shock the conscience.²² Clarence Darrow, recalling his defense of two trade unionists accused of causing a deadly fire at the *Los Angeles Times* building, observed that, "[t]he lawyer, if he has a deep sense of responsibility and warm sympathies, regards the human being in his hands in the same light that a physician views a patient."²³

19. See PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 193 (1992) (arguing for the importance of a "framework of bonding to other persons and to person-centered activities"); Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1061-66 (1992) (discussing "connection" in legal practice); see also Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605, 606-07 (1999) (advocating a model of "empathetic engagement" with clients). But see Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2262 (2001) (critiquing the "facile rhetoric of empathy and solidarity").

20. See Cahn, *supra* note 19, at 1064-65 (discussing the idea that lawyers should look to the goals of a client's community when choosing who to represent in order to establish a connection with clients).

21. See Margulies, *supra* note 19, at 621, 629.

22. In cases involving allegations of especially heinous crimes such as genocide or other forms of mass murder, affective solidarity may be a challenging task for even the most seasoned practitioner. A system that expected affective solidarity in all cases could leave certain clients without meaningful representation. In such cases, the lawyer may fall back on systemic rationales, such as due process or "making the government prove its case," that justify zealous advocacy regardless of difficulties in empathizing with a particular client. See Ogletree, *supra* note 1, at 1258 (providing several rationales for defending criminals). Lynne Stewart's terse reply, "Prove it," to the Government's allegations that she lent material support to terrorist activity reflects this systemic rationale. See Benjamin Weiser & Robert F. Worth, *A Nation Challenged: Indictment; Indictment Says a Lawyer Helped a Terror Group*, N.Y. TIMES, Apr. 10, 2002, at A1 (describing Stewart's comments after pleading "not guilty" to the charges against her).

23. CLARENCE DARROW, *THE STORY OF MY LIFE* 180 (DaCapo Press 1996) (1932).

Michael Tigar, writing about *Washington v. Williams*,²⁴ in which a Native American couple were convicted of negligent homicide in the death of their child from an infection arising from a gangrenous tooth, insists that, "the advocate must evoke the client's and the jurors' human concerns."²⁵

Lynne Stewart, even after the Government charged her with providing material support to a terrorist organization in the course of her representation of Sheikh Abdel Rahman, illustrated why affective solidarity is a lawyerly virtue. Consider the case of another one of Stewart's clients, Salvatore "Sammy the Bull" Gravano, whose testimony contributed to the conviction of his former boss, the late Mafia chief-tain John Gotti.²⁶ Gravano confessed to at least nineteen murders in the course of his testimony.²⁷ After the Gotti trial, federal authorities relocated Gravano in Arizona as part of the federal Witness Protection Program.²⁸ Seeking a career change from enforcer to entrepreneur, Gravano started a multimillion-dollar drug ring in Arizona selling the drug Ecstasy to teens.²⁹ Gravano retained Lynne Stewart, prior to her indictment.³⁰

After Stewart's indictment on charges of providing material support to the Islamic Group, the Government made a motion to disqualify her from continuing to represent Gravano.³¹ Gravano initially indicated that he wanted to continue to be represented by Stewart, but apparently expressed concern that the Government, which had obtained a warrant to monitor conversations between Stewart and Sheikh Abdel Rahman, had used similar methods in his case.³² As Stewart explained, "'Sammy being Sammy' . . . he said, 'My God! Were they listening in on us, too?'"³³

24. 484 P.2d 1167 (Wash. Ct. App. 1971).

25. See Michael E. Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 REV. LITIG. 177, 190 (1990). In his mock summation, Tigar invoked Native Americans' historic distrust of organized medicine, arguing that the defendants "did not make a world in which when you go to the clinic, the doctors and nurses make you sit and wait and then are cold, impersonal, and uncaring." *Id.* at 191.

26. William Glaberson, *Gravano Keeps His Lawyer Despite Her U.S. Indictment*, N.Y. TIMES, Apr. 19, 2002, at B3.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See William Glaberson, *Mafia Turncoat Reverses Himself on Keeping His Indicted Lawyer*, N.Y. TIMES, May 11, 2002, at B5 (reporting that Gravano would no longer oppose the Government's motion to disqualify Lynne Stewart).

33. Glaberson, *supra* note 26.

In her seemingly casual comment about "Sammy being Sammy," Stewart displayed a consummate affective solidarity with her client. Faced with the possibility of a twenty-year sentence and having pleaded guilty to drug trafficking charges in the Ecstasy case, Mr. Gravano presumably did not have a lot of people with whom he could engage in such repartee.³⁴ While this shared moment was fleeting,³⁵ the capacity for bonding with disdained clients displayed by Stewart remains a significant virtue in a democratic legal system.³⁶

B. Positional Solidarity

Affective solidarity is not sufficient for lawyers who see their calling as addressing societal injustice. Lawyers committed to this project express positional solidarity with clients.³⁷ In this stance, the lawyer adopts a public position that dovetails with the client's express or implied message. Positional solidarity can focus the lawyer's efforts, provide helpful information to prospective clients, and create a favorable climate for social change. However, lawyers practicing positional solidarity should also recognize that this posture can undermine affective ties and sabotage client interests. Moreover, positional solidarity in

34. *See id.*

35. *See* Glaberson, *supra* note 32. Gravano subsequently decided to seek other counsel, presumably because he was in fact concerned that the Government would contend it had a reasonable basis for monitoring his future conversations with Stewart, or because he no longer believed that Stewart was the ideal person to assist him in seeking sentencing consideration from the court and the United States Attorney. *See id.* Whatever Stewart's view of the justice of the Government's motion to disqualify her, her understanding of her client's situation doubtlessly led her to recognize the prudence in Gravano's calculus. *See infra* note 76 and accompanying text.

36. *See infra* Part II.B (discussing the Stewart case in depth); *see also* George Packer, *Left Behind*, N.Y. TIMES, Sept. 22, 2002, § 6, at 42 (quoting Stewart as describing the imprisoned Sheikh Abdel Rahman as "Daniel in the lion's den"). However, exalting affective commitment also creates risks. An excess of solidarity can rob a lawyer of the clear eye necessary for evaluating a client's case. *See* Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 270-74 (1999) (analyzing phenomenon that psychologists call counter-transference, in which a client's traumas are transferred to the lawyer).

37. *Cf.* Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339, 2340 (1999) (drawing a distinction between positional conflicts of interest, which involve the simultaneous argument of two opposing legal propositions in the same tribunal, and mission conflicts, which involve disputes about the objectives of a public interest law organization). In that piece, I argued that public interest organizations should construe mission conflicts narrowly to allow maximum space for representing diverse community interests. *Id.* at 2363. My use of the term "positional solidarity" here is closer to the concept of mission outlined in my earlier piece.

terrorism cases can evolve into an operational link that exceeds the lawyer's role.³⁸

Lawyers identify themselves with their clients' positions in a variety of contexts. Legal services lawyers often see themselves as representing the interests of people living in poverty.³⁹ Lawyers for survivors of domestic violence fight for equality in society's treatment of relationships within the family.⁴⁰ Civil rights lawyers fought not just to benefit individual clients, but also to end segregation.⁴¹ For lawyers representing persons or groups accused of terrorist activity,⁴² posi-

38. See *infra* note 103 and accompanying text (noting how representation of suspected terrorists may veer into operational solidarity).

39. Margulies, *supra* note 37, at 2339-40.

40. Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1103-04 (1995).

41. Cf. Bell, *supra* note 16, at 490-91 (discussing the conflict between the goals of civil rights attorneys and their clients). Human rights lawyers cultivate a similar solidarity, often informed by allegiance to the systemic ideal of the "rule of law." See Ronen Shamir & Neta Ziv, *State-Oriented and Community-Oriented Lawyering for a Cause: A Tale of Two Strategies*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 287, 297 (Austin Sarat & Stuart Scheingold eds., 2001) (stating that most cause lawyers believe litigation and constitutional arguments are the most successful strategy); cf. George Bisharat, *Attorneys for the People, Attorneys for the Land: The Emergence of Cause Lawyering in the Israeli-Occupied Territories*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 453, 471-72 (Austin Sarat & Stuart Scheingold eds., 1998) (discussing how a narrow focus on rule of law issues can discourage broader use of law for social change).

42. This Article defines terrorism as the intentional targeting of civilians for political purposes by nominally non-governmental groups. Such organizations may benefit from state sponsorship or, as in the case of Al Qaeda in Afghanistan, exercise clandestine control over the state apparatus. See PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMON-SENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 6 (1998) (defining terrorism as "violence conducted as part of a political strategy by a subnational group or secret agents of a foreign state"); Richard Falk, *Ends and Means: Defining a Just War*, THE NATION, Oct. 29, 2001, at 11-12 (arguing that Al Qaeda is a "transnational actor . . . [whose] relationship to the Taliban regime in Afghanistan [was] . . . contingent, with Al Qaeda being more the sponsor of the state rather than the other way around"). Contemporary terrorist organizations, ranging from Al Qaeda to the Kach group in Israel, single out persons of particular groups for violence. Al Qaeda has targeted Americans and Jews, while the Kach group, on a scale smaller in implementation but not necessarily in ambition, has targeted Palestinians. See BRUCE HOFFMAN, *INSIDE TERRORISM* 101 (1998) (discussing the genocidal rhetoric of Kach). States have legitimate interests in deterring such violence.

Adopting this definition of terrorist activity gives rise to two important caveats. First, deterring group violence must be accompanied by strong efforts to eliminate the use of inappropriate violence and the pursuit of inequitable policies by states, including America's allies. See DANA R. VILLA, *POLITICS, PHILOSOPHY, TERROR: ESSAYS ON THE THOUGHT OF HANNAH ARENDT* 15-21 (1999) (discussing "totalitarian terror"); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 323 (2000) (discussing "state terrorism" as one strand in the definition of terrorism). Second, the legal system must guard against the prospect that fear of terrorism, like fear of incursions from other states, will prompt measures that threaten civil liberties and single out individuals for unfair treatment. See JAMES X. DEMPSEY & DAVID COLE,

tional solidarity can involve support of goals and tactics. Lynne Stewart, for example, explained her representation of the Islamic Group's Sheikh Abdel Rahman, a foe of the Mubarak regime in Egypt, by acknowledging, "I certainly have deep sympathy for the struggle in Egypt . . . [the fundamentalist movement] is the only hope for change there, the one that gathers the imagination of the people, that motivates them."⁴³ Speaking of tactics, Stewart explained, "I don't believe in anarchistic violence but in directed violence That would be violence directed at the institutions which perpetuate capitalism, racism and sexism, and at the people who are the appointed guardians of those institutions, and accompanied by public support."⁴⁴

Applying her typology of "anarchistic" versus "directed" violence, Stewart described the first World Trade Center bombing in 1993 as "pretty much anarchistic."⁴⁵ She never publicly endorsed specific actions for which the Islamic Group claimed responsibility, such as the 1997 attack on a group of tourists in Luxor, Egypt which killed over sixty people.⁴⁶ However, Stewart used her access to the media to publicize her client Sheikh Abdel Rahman's views favoring violence. In 2000, for example, Stewart announced to the media the decision by the Sheikh, still serving his federal sentence for plotting to blow up New York City landmarks, to withdraw his support for a cease-fire declared by the Islamic Group after the Luxor attack.⁴⁷

TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 35-48 (2002) (detailing pre-September 11 law enforcement targeting of Palestinian students for espousing unpopular views); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 561 (1994) (discussing racist stereotypes of Arabs after the 1993 World Trade Center bombing); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1, 11-15 (2001) (discussing images of Arabs and Muslims in American media as terrorists and profiling by law enforcement groups); cf. Susan M. Akram & Kevin R. Johnson, 'Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy'—*Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURV. AM. L. 295 (2002) (discussing post-September 11 detentions of Muslims and Arabs); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (same).

43. Joseph P. Fried, *In Muslim Cleric's Trial, a Radical Defender; Left-Leaning Lawyer and Revolutionary Sympathizer Comes Back in the Limelight*, N.Y. TIMES, June 28, 1995, at B1. Stewart argued that the Government was framing the Sheikh, who at the time was charged with plotting to blow up New York City landmarks, because of his political and religious opinions. *Id.*

44. *Id.*

45. *Id.*

46. See Douglas Jehl, *70 Die in Attack at Egypt Temple*, N.Y. TIMES, Nov. 18, 1997, at A1 (describing the attack of tourists in Luxor, Egypt).

47. Cam Simpson, *Terrorists Push Plots from Jail; Militant Sheikh Got Messages to His Followers*, CHI. TRIB., Nov. 19, 2001, at 1N.

The high profile that Stewart maintained as she opined publicly about violence illustrates crucial problems positional solidarity can pose for both clients and the public interest. Over time, this stance enhances the lawyer's status, but can narrow options for clients.⁴⁸ Situations involving positional solidarity on the use of violence demonstrate, moreover, that unleashed violence has an inflexible dynamic of its own.⁴⁹ This dynamic makes short work of distinctions such as Lynne Stewart's categories of "anarchistic" and "directed" violence.⁵⁰

Positional solidarity's risks for clients emerge at every turn in the legal process: counseling, pretrial, and trial. A lawyer may fail to adequately counsel her clients because her view of what the law *should be* leads her to disregard what the law *is*. For example, the lawyer may doubt the constitutionality of legislation that prohibits material support of organizations, like the Islamic Group, designated by the Secretary of State as engaging in terrorist activity.⁵¹ However, if the lawyer fails to advise her client that courts have rejected facial challenges to this legislation,⁵² she may subject her client to harms that the client has not foreseen.

Indications of harm to the client are implicit in the Stewart indictment. For example, after the FBI arrested Stewart and her co-defendants on charges of perpetuating fraud on the federal government, making false statements, and providing material support to a designated terrorist organization, the Bureau of Prisons moved Sheikh Abdel Rahman from his location in Minnesota, and barred him from communicating with his remaining attorneys until they

48. Lawyers' decisions may narrow a client's options in a variety of ways. See Bell, *supra* note 16, at 471, 490 (arguing that lawyers opposing segregation sometimes discounted clients' interests in other approaches, such as maximizing resources for schools in African-American communities); Margulies, *supra* note 40, at 1071 (criticizing poverty lawyers for initially failing to pay sufficient attention to violence against women); cf. Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998) (discussing "path dependence" in evolution of legal doctrine, in which prior agendas limit future development).

49. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 99 (1994).

50. See *supra* text accompanying note 45 (noting Stewart's distinction of "anarchistic" and "directed" violence).

51. See, e.g., David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 205-06 (arguing that the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), 18 U.S.C. § 2339A, violates First Amendment rights because it makes it unlawful to support terrorist organizations in their lawful activities).

52. See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1028 (7th Cir. 2002) (finding that civil liability under 18 U.S.C. § 2333 for funding a foreign terrorist organization does not violate the freedom to associate if the defendant had knowledge of the group's illegal activity and helped to support that activity); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133-36 (9th Cir. 2000) (same), *cert. denied*, 532 U.S. 904 (2001).

signed an agreement to permit monitoring of their conversations with the Sheikh.⁵³ This condition is not unreasonable if the Government can support its allegations regarding the course of conduct between the Sheikh and Stewart.⁵⁴ If the allegations are true, Stewart could have avoided the imposition of these new restraints on her client by fulfilling the lawyer's traditional role of cautioning a client who has approached the border of illegal activity.

The lawyer's positional solidarity may also narrow the client's options pretrial. Positional solidarity may, for example, lead the lawyer to rule out cooperation with the "enemy," i.e., the government.⁵⁵ The lawyer may seek the client's martyrdom, rather than a favorable deal. The client may not share this view.⁵⁶

The diminishing returns of positional solidarity continue at trial. A lawyer who publicly avows solidarity with violence gains the attention of both prospective consumers of her services and the public at large. The lawyer's public expressions of support for violence provide a benefit for prospective clients, by helping them make more informed decisions about retaining counsel.⁵⁷ Once prospective clients

53. Robert F. Worth, *Government Cuts Contact with Sheikh, Lawyer Says*, N.Y. TIMES, Apr. 26, 2002, at B4.

54. See *infra* notes 82-85 and accompanying text (discussing the appropriate standard for monitoring attorney-client conversations).

55. Lawyers who specialize in the representation of criminal defendants sometimes criticize cooperation with the government, otherwise known as "snitching," as a form of betrayal, an invitation to dishonesty, and a practice that compromises the checks on government power built into the adversary system. Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 118-19 (1995); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 618-19 (1999).

56. See Richman, *supra* note 55, at 126 (noting that some clients want to cooperate with the government). Of course, the client may wish to be a martyr after all. This may be one of the objectives driving the desire of Zacarias Moussaoui, who is charged by the government with being the "twentieth hijacker" slated for the September 11 attacks, to represent himself. A lawyer must retain the flexibility to engage her client in a conversation about objectives, without restricting alternatives through preconceptions about either the client or the legal landscape. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 55-56 (1990) (discussing ways in which speech patterns inform preconceptions about clients).

Positional solidarity with violence not only imputes the desire for martyrdom to the client, but acts as a self-fulfilling prophecy. The government will be less willing to offer a worthwhile plea agreement if it does not trust the defendant's attorney. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 765-67 (1999) [hereinafter *Federal Criminal Law*] (discussing how federal criminal law gives a large degree of discretionary authority to prosecutors). See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (discussing prosecutorial discretion in plea bargaining).

57. For a prospective client such as Sheikh Abdel Rahman who faced virtually universal opprobrium, a lawyer's prior public statements are a signal that the lawyer will treat the

become clients, however, relying on the lawyer's positional solidarity can be treacherous.

While prospective clients seek out lawyers who express positional solidarity with violence, the public at large does not share these sentiments. An attorney may not object to such notoriety; indeed, she may court it. Unfortunately, when the attorney arrives at court with her client, she may confront members of this hostile public in the jury pool. Since jurors inevitably judge a defendant in part based on their view of the defendant's lawyer, at this juncture the client derives little benefit from the lawyer's positional solidarity.⁵⁸ Indeed, public knowledge of the lawyer's support of violence may make it more difficult for the defendant to credibly assert that he did not commit the acts charged.⁵⁹ In such cases, the lawyer's signaling may work too well, with the client receiving messages of solidarity, but the jury perceiving signals of guilt.⁶⁰

client with empathy. In this sense, positional solidarity actually reinforces affective solidarity.

58. The lawyer may seek to ferret out such predispositions on voir dire. See Tigar, *supra* note 25, at 191 (noting the oath jurors take at voir dire to answer all questions truthfully). Formulating effective questions may, however, be difficult; the lawyer may wish to avoid queries such as: "Have you ever heard of me?", "How do you really feel about attorneys who advocate violence?" or "Did I have a bad hair day on 'The O'Reilly Factor?'" In addition, in federal court, where most terrorism cases are tried, judges control voir dire. A judge has little incentive to inquire about these issues.

Positional solidarity affects the client's prospects at trial not only through juror predispositions, but also through lack of access to information possessed by the government. Outside of the realm of exculpatory evidence, which the government must turn over to the defense, prosecutors have wide discretion about what evidence to disclose. See generally Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 941 (1997) (discussing how the rules of evidence affect prosecutorial discretion). Prosecutors will be much less willing to disclose information to attorneys whom they regard as encouraging violence. I am grateful to Dan Richman for sharing this observation.

59. The noted radical lawyer William Kunstler understood this phenomenon. See WILLIAM M. KUNSTLER & SHEILA ISENBERG, *MY LIFE AS A RADICAL LAWYER*, at xv (1994) (noting how Kunstler declined to defend a man accused of shooting and killing Yeshiva students because he did not regard the matter as political, and "felt that the case could seriously harm [his] representation of defendants" in the pending trial of Sheikh Abdel Rahman and others). Here, again, the skilled lawyer will generally seek to cultivate some ambiguity in her public statements, to avoid this problem. Perhaps Stewart was hoping to produce this kind of ambiguity with her distinction between "institutional" and "anarchistic" violence.

60. See, e.g., Tigar, *supra* note 25, at 197 (arguing that a client will bear the brunt of a jury who dislikes a lawyer). Clients may also seek to send messages to the jury through their choice of counsel. Cf. Wilkins, *supra* note 10, at 1038 (arguing that African-American lawyers should not serve as counsel for persons or groups with avowedly racist views who may select a lawyer to "launder" offensive positions).

Lawyers expressing support for violence should also recognize that violence is a seductive topic of conversation, but a difficult habit to control. A lawyer may start with the generic advocacy initially engaged in by Lynne Stewart, gingerly distinguishing between "directed" and "anarchistic" violence.⁶¹ Over time, however, the lawyer's pronouncements about violence may become more specific as to timing, targets, or intended audience. For example, the Government alleges that Stewart ended up facilitating the communication of more specific statements about violence, intended for action by members of the Islamic Group, including a directive to "kill [Jews] wherever they are."⁶² Such specificity risks transforming the lawyer into a collaborator in criminal activity.

C. *Operational Solidarity*

That collaboration is the subject of the third and final kind of allegiance: operational solidarity. Operational solidarity entails the lawyer's participation in ongoing enterprises conducted by the client. This brand of solidarity undermines the Tocquevillian conception of the lawyer as an intermediary between client and state.⁶³ To cultivate the perspective necessary for this intermediary function, the lawyer requires some degree of independence. Operational solidarity compromises that perspective, placing both client and public interests at risk.⁶⁴

To preserve the Tocquevillian role, the law generally frowns on lawyers becoming operationally involved with clients. Lawyers going into business with clients, even in the seemingly innocuous context of receiving options to buy stock in a corporation as payment for legal work, must observe special procedural safeguards to limit overreaching.⁶⁵ The law is even more watchful of a lawyer's active or tacit involvement in client crime or fraud. Lawyers cannot counsel a client to

61. Fried, *supra* note 43 (providing Stewart's statements).

62. See Indictment at 14-15.

63. See DE TOCQUEVILLE, *supra* note 13, at 266 (explaining that the lawyer is the liaison between the government and the people).

64. A parallel critique of operational solidarity would argue that it blurs the line between principal and agent that defines a lawyer's task. For a discussion that interprets the lawyer's function and purpose toward the client as an agency relationship, see James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 399-401 (2000).

65. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (1983). Indeed, a written agreement is necessary to allow the lawyer to share in a contingent fee arrangement, such as for a damage claim, that is the subject of a legal action in which the lawyer represents the client. See MODEL RULES OF PROF'L CONDUCT R. 1.5(c).

engage in ongoing illegal activity.⁶⁶ The crime-fraud exception to the attorney-client privilege allows courts to compel disclosure of communications that give rise to such counsel.⁶⁷ Lawyers may not aid clients who wish to testify falsely, even though rules preventing such aid may chill lawyer-client communications, thereby compromising affective solidarity.⁶⁸

Properly applied, rules that bar a lawyer's operational ties to ongoing crimes serve both client and public interests. A lawyer with an operational tie to the client cannot adequately advise the client about the loss of protections, such as attorney-client privilege, on which the client may rely.⁶⁹ Rules against operational solidarity also protect the public by preventing the lawyer from trading on professional prerogatives to discharge the less revered role of accomplice in wrongdoing.⁷⁰

Consider, for example, a case in which evidence suggests that a lawyer has assisted his client in fleeing the jurisdiction.⁷¹ In such a case, the lawyer has not acted as an attorney, using her skill and judgment to counter the government's charges. Instead, the lawyer has exploited her role as a professional to enhance her value as an accessory after the fact.⁷² Rules regulating operational solidarity seek to deter such manipulation. Such concerns become particularly acute in the context of representing persons accused of terrorist activity. In

66. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

67. See *Am. Tobacco Co. v. Florida*, 697 So. 2d 1249, 1257 (Fla. Dist. Ct. App. 1997) (holding that the crime-fraud exception to the attorney-client privilege permits disclosure of confidential company documents created under lawyers' rubric specifically for the purpose of allowing the company to conceal from the public the health risks of smoking and the company's knowledge thereof); see also *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1452 (D. Ariz. 1992) (stating "an attorney may not continue to provide services to . . . clients when the attorney knows the client is engaged in a course of conduct designed to deceive others, and where it is obvious that the attorney's compliant legal services may be a substantial factor in permitting the deceit to continue").

68. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (prohibiting an attorney from offering evidence that the attorney knows is false).

69. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (2002) (stating that "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client").

70. See JANET MALCOLM, *THE CRIME OF SHELIA MCGOUGH* 9-10 (1999) (describing a case in which a lawyer was convicted of fraud because of her participation in her client's confidence scheme). The lawyer denied culpability and asserted that she had declined to testify on her own behalf out of loyalty to her client.

71. See *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994) (mentioning that the Government suspected that the defendant's attorney had helped the defendant to flee the country).

72. The Government alleges that Lynne Stewart gamed the system in an analogous fashion. See *Indictment* at 12-16.

such cases, clients may use lawyers to launder money for illegal operations through a legal defense fund.⁷³ Clients may also leverage lawyers to both disseminate plans for future violence and conceal such plans from law enforcement.⁷⁴ Use of lawyers as accessories to terror impinges on the safety of the public and the integrity of the legal profession.

Application of rules against operational solidarity must, however, assure the lawyer's independence not only from her client, but also from the state. Overbroad interpretation of safeguards against operational solidarity would encompass core lawyering functions in a democracy, such as defense of a client against charges of past criminality.⁷⁵ Courts interpreting rules against operational solidarity cannot allow the government to use such rules against attorneys whose principal offense is effective representation of unpopular clients.

II. GOVERNMENT RESPONSES: ENSURING INDEPENDENCE OR IMPOSING SOLIDARITY WITH THE STATE?

The best prosecutors understand that a vigorous advocate for the defense strengthens the democratic ideals underlying the criminal justice system. However, prosecutors may also seek strategic advantage by undermining solidarity between a defendant and his lawyer.⁷⁶ In times of national crisis, moreover, undermining the solidarity of a lawyer with an unpopular client is a convenient means of stifling dissent.⁷⁷ Courts should consider these risks when they confront the

73. See *United States v. Rahman*, 861 F. Supp. 266, 276-77 (S.D.N.Y. 1994) (noting that the Government, in the trial of Abdel Rahman and his co-defendants, had proffered evidence that the legal defense fund of one co-defendant, raised in connection with a prior state prosecution, was disbursed by another co-defendant for illegal activity).

74. This is the gravamen of the allegations against Stewart. Indictment at 11-16.

75. A lawyer who successfully defends a client against such charges does, in some literal fashion, "facilitate" ongoing illegality if a client subsequently engages in criminal acts. See Ogletree, *supra* note 1, at 1270 (noting that many acquitted defendants find themselves in trouble with the law at a later time).

76. See Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 354-56 (1989) [hereinafter *Her Brother's Keeper*] (noting that prosecutors have an opportunity to call a defense lawyer's former client as a witness or initiate a criminal investigation against the defense attorney to create an ethical conflict between the attorney and his client); Bruce A. Green, "Through a Glass, Darkly": *How the Court Sees Motions to Disqualify Defense Lawyers*, 89 COLUM. L. REV. 1201, 1230 (1989) (discussing the impact of disqualification motions on an attorney-client relationship).

77. See generally Hentoff, *supra* note 5 (repeating that the result of Stewart's indictment will "create a huge chilling effect—indeed, a glacial effect—on attorneys approached by highly controversial clients to represent them").

repertoire of methods the government uses to curb solidarity. This repertoire includes motions for disqualification, the imposition of conditions on lawyer-client communication, and criminal prosecution of lawyers.⁷⁸ This section discusses these options, and then describes the Government's case against Lynne Stewart.

A. *Government Efforts to Regulate Operational Solidarity*

1. *Conditions on Lawyer-Client Communication.*—The government has for some time imposed post-trial communications restrictions on some prisoners convicted of terrorist activity and on the lawyers who represent them.⁷⁹ These restrictions, typically called "Special Administrative Measures" (SAMs), limit the inmate's contact with persons who could send or receive information related to terrorist activities.⁸⁰ They also limit the attorney's ability to communicate with third parties or with the media on her client's behalf.⁸¹

In a more radical move, after September 11, the Department of Justice announced that it would begin monitoring the conversations of some thirteen defendants in federal custody.⁸² In most cases, the government did not indicate whether it had probable cause that would justify such a restriction.⁸³ The government noted that it would notify attorneys and clients subject to such monitoring and screen ac-

78. See Bureau of Prisons, General Management and Administration, 28 C.F.R. § 501.3 (2002) (authorizing the monitoring of attorney-client communications); Green, *Her Brother's Keeper*, *supra* note 76, at 354-56 (discussing the prosecutor's duty to disqualify opposing counsel based on conflict of interest); Weiser & Worth, *supra* note 22 (detailing the indictment of Lynne Stewart).

79. The government conditions the lawyer's access to their clients on consent to the restrictions. See Indictment at 4-5.

80. 28 C.F.R. § 501.3. In their focus on avoiding aid to terrorist activity, SAMs have a different rationale than the more traditional limit on attorneys' communication: the gag order. A judge imposes a gag order during the pendency and conduct of a trial to bar both the prosecution and defense from discussing the merits of the case in a manner likely to influence potential jurors. See *United States v. Cutler*, 58 F.3d 825, 829-31, 841 (2d Cir. 1995) (upholding a contempt citation against an attorney for repeatedly violating a gag order).

81. See 28 C.F.R. § 501.3; see also Indictment at 4-5.

82. See Steve Fainaru, *Saudi Convicted in Embassy Bombings Sues; Filing Challenges Rule Allowing Eavesdropping on Attorney-Client Discussions*, WASH. POST, May 9, 2002, at A20 (noting that Attorney General John Ashcroft approved a new attorney-client monitoring rule in October 2001 on an emergency basis).

83. See Hentoff, *supra* note 5 (quoting Professor Stephen Gillers as arguing that monitoring should require court order and showing of probable cause). The government indicated after the Lynne Stewart indictment that it would require consent to such monitoring by any attorney seeking to meet with Sheikh Abdel Rahman. Worth, *supra* note 53. The allegations in the Stewart indictment, if supported, constitute the kind of individualized evidence of misconduct that would justify such an extreme measure. See *supra* notes 5-6 and accompanying text.

cess to the recordings to reduce the risk of disclosing attorney-client privileged material to a lawyer appearing for the government in court on any related matter.⁸⁴ Critics asserted that monitoring would impede not just the operational allegiance in illegal conduct, but any kind of meaningful rapport between attorney and client.⁸⁵

2. *Disqualification.*—The government has long sought to curb operational solidarity by moving to disqualify attorneys in criminal cases on two linked rationales: (1) the attorney's loyalty to, or possession of, confidential information about another client constitutes a conflict of interest, and (2) the attorney's participation in communications involving alleged ongoing illegality among defendants transforms the attorney's role at trial from the appropriate role of advocate to the inappropriate role of "unsworn witness."⁸⁶

Conflicts of interest are common in cases involving alleged concerted criminal enterprises, including organized crime and terrorist activity. "Kingpins" of such enterprises commonly pay attorneys to provide legal services for underlings.⁸⁷ In terrorist cases, defendants tend to cluster around attorneys like Lynne Stewart or her one-time co-counsel, the late radical lawyer William Kunstler, whose public pronouncements signal both affective and positional solidarity.⁸⁸ Conflicts of interest arise when members of the enterprise decide to cooperate with the government, and a lawyer who had previously rep-

84. In cases where the government can show probable cause to believe that lawyer and client are collaborating in an illegal activity, the crime-fraud exception to attorney-client privilege would permit admission of any evidence demonstrating such a collaboration. Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 344 (1998) (citing *In re Grand Jury Subpoenas*, 144 F.3d 653, 661 (10th Cir. 1998)). To ease its burden in such cases, the government received statutory permission from Congress to obtain warrants under the Foreign Intelligence Surveillance Act (FISA). See Hurtado, *supra* note 5. It was apparently this Act that, more than a year before September 11, provided the authority for a warrant permitting the government to record the conversations of Lynne Stewart and members of her legal team with Sheikh Rahman. See *id.*

85. Hurtado, *supra* note 5. At least one lawsuit has been filed on the monitoring issue. See Fainaru, *supra* note 82.

86. See Green, *Her Brother's Keeper*, *supra* note 76, at 328-29.

87. See Richman, *supra* note 55, at 122.

88. Kunstler's law firm, Kunstler & Kubly, at one point represented virtually all of the individuals who became defendants in *United States v. Rahman*. 861 F. Supp. 266 (S.D.N.Y. 1994). The court disqualified the firm from representing co-defendant El-Gabrowny in that matter because, *inter alia*, the firm acting as El-Gabrowny's agent had made a number of conflicting representations to the court about the purpose of fraudulent passports found in El-Gabrowny's control. *Id.* at 272-73. The court reasoned that if El-Gabrowny took the stand in his own defense, these statements might have been admissible for impeachment purposes. *Id.* at 273. Counsel, if permitted to proceed, may have exhibited greater reluctance to call El-Gabrowny because they faced embarrassment at the revelation of their contradictory accounts.

resented that individual now must cross-examine her in the course of representing others in the organization.⁸⁹

In cases involving such a cluster of relationships, courts may also resort to the unsworn witness theory. The rationale for the unsworn witness theory is that a lawyer who was present for many of the occurrences, conversations, or transactions that comprise the government's proof can "subtly impart" her take on those events to the jury, without the usual safeguards such as testimony under oath and cross-examination.⁹⁰ The attorney then comes to occupy a kind of dual role, becoming in effect an "unsworn witness."⁹¹

Courts have held that a lawyer's performance of the unsworn witness role prejudices the prosecution. For example, in the prosecution of John Gotti, significant portions of the Government's proof involved wide-ranging conversations with Gotti's associates, which Gotti's attorney, Bruce Cutler, observed.⁹² Cutler could have turned his own performance before the jury into an unsworn counterpoint to the Government's testimony. The court granted the Government's motion to disqualify Cutler to preclude this kind of end-run around evidentiary safeguards.⁹³ The unsworn witness doctrine's message about operational solidarity is clear: to avoid disqualification, lawyers should avoid being "in the room" when a client and his associates engage in casual conversation about criminal activity.

3. *Criminal Prosecution.*—The government resorts to criminal prosecution when it views disqualification as an inadequate response

89. To cross-examine effectively, the lawyer may be required to use knowledge she acquired when representing the witness—knowledge acquired in reliance on the lawyer's duty of confidentiality. In some cases, courts have turned to standby counsel—an attorney not affiliated with the lawyer for the current defendant—to perform the cross-examination. *See id.* at 277. However, the closer the relationship between the representation of the witness and the charges against the defendant, the more difficult it is to cure a conflict through standby counsel or to allow a waiver by the defendant. *Id.* This is particularly true because the defendant's lawyer may use confidential information, not just in cross-examination of the former client, but in direct or cross-examination of other witnesses, and in opening and closing.

90. *See* Roxanne Malaspina, *Resolving the Conflict of the Unsworn Witness: A Framework for Disqualifying House Counsel Under the Advocate-Witness Rule*, 67 N.Y.U. L. REV. 1073, 1094-98 (1992) (discussing the unsworn witness theory); *see also* Rahman, 861 F. Supp. at 275-76.

91. Malaspina, *supra* note 90, at 1096.

92. *See* United States v. Locascio, 6 F.3d 924, 934 (2d Cir. 1993). Because these conversations involved planning ongoing criminal activity rather than mere discussion of the legal implications of past acts, the tapes did not contain matter protected by attorney-client privilege and were thus admissible at trial. *United States v. Zolin*, 491 U.S. 554, 562-631 (1989) (noting that the crime-fraud exception begins to apply when an attorney's advice or services are used to conduct or continue criminal acts).

93. *Locascio*, 6 F.3d at 934.

to operational solidarity. The history of criminal prosecution of attorneys for acts of operational solidarity reflects the competing concerns outlined in this Article. On the one hand, prosecution focuses on lawyers who trade in their professional prerogatives to facilitate illegal conduct.⁹⁴ However, times of crisis have also precipitated punitive action against lawyers who represented clients perceived as threats to public order or the prevailing national consensus.⁹⁵

The last century witnessed repeated governmental efforts, founded or unfounded, to prosecute or impose professional discipline on lawyers representing social, political, and economic outsiders. For example, the Government twice indicted Clarence Darrow for allegedly bribing jurors during the McNamara trial.⁹⁶ A jury took ten minutes to acquit Darrow in the first case, while another jury deadlocked in the second case, in which charges ultimately were dismissed.⁹⁷ After the United States entered World War I, states disbarred lawyers who associated with radical labor organizations such as the International Workers of the World, and jailed lawyers who counseled clients not to register for the draft.⁹⁸ Decades later, the FBI tapped the phone of Martin Luther King's friend and adviser, lawyer Stanley Levison, who was also subpoenaed to appear before the Senate Internal Security Subcommittee.⁹⁹ Federal authorities apparently suspected Levison of being a Communist.¹⁰⁰

More recently, the government has prosecuted attorneys as part of the war on drugs. In the mid-1990s, a number of Miami lawyers were convicted of, or pleaded guilty to, money laundering and racketeering, based, in part, on evidence that they acted as "bag men" for the Colombian Cali drug cartel.¹⁰¹ In 1999, Lynne Stewart pleaded

94. See Green, *supra* note 84, at 355-60 (describing varying degrees of conduct that may lead a lawyer to be considered an accessory to her client's ongoing criminal enterprises).

95. *Id.* at 327 (arguing that recent prosecutions risk "overcriminalization" of zealous advocacy for clients).

96. DARROW, *supra* note 23, at 185-90.

97. *Id.* at 189-91. Subsequent research suggests that Darrow may actually have been guilty. See Alan M. Dershowitz, *Introduction to DARROW*, *supra*, at v-vi.

98. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 104 (1976).

99. See KUNSTLER & ISENBERG, *supra* note 59, at 110-11.

100. *Id.*

101. See Larry Lebowitz, *Curious Jurors Ask: Where Is Moran?; Panelists Noticed Cartel Attorney Missing at Trial*, FT. LAUDERDALE SUN-SENTINEL, July 25, 1998, at 1B (discussing the convictions of lawyers Michael Abell and William Moran for racketeering and money laundering conspiracy). One attorney who pleaded guilty admitted that he had knowingly obtained false statements on behalf of drug defendants, and had delivered \$75,000 in drug profits to the wife of a jailed drug trafficker. Associated Press, *Ex-Federal Prosecutor Pleads Guilty in Columbia Cocaine Case*, CHI. TRIB., July 3, 1995, at 1C.

guilty to the misdemeanor charge of refusing to testify before a grand jury about a fee agreement with a client convicted of drug trafficking.¹⁰²

In some of these cases, lawyers may have veered into operational solidarity, committing crimes or counseling others to do so. In other cases, however, the government targeted attorneys for their positional solidarity with unpopular groups or movements for social change.¹⁰³ The high stakes involved in representation of persons accused of terrorist activity magnify the importance of the boundary between operational and positional ties.

B. Prosecution or Persecution: The Lynne Stewart Case

The Government's case against Lynne Stewart hinges on the location of the border between operational and positional solidarity. The Government asserts that her conduct falls squarely on the operational side of the divide.¹⁰⁴ Stewart and her supporters argue that the Government is seeking to silence a resourceful courtroom adversary and shrink the protections of the First and Sixth Amendments for groups that challenge the status quo.¹⁰⁵ Some brief background on the Stewart indictment and its underlying context may inform the analysis of these competing views.

Lynne Stewart defended Sheikh Abdel Rahman against charges that he and others conspired to assist in the 1993 World Trade Center bombing and bomb New York City landmarks such as the Holland Tunnel and the United Nations building.¹⁰⁶ A jury convicted the

102. See Andrew Jacobs, *Defense Lawyer Pleads Guilty to Refusing to Testify About a Client*, N.Y. TIMES, Mar. 25, 1999, at B4. Stewart's lawyer, Stanley Cohen, explained Stewart's decision not to testify in terms of positional solidarity, asserting, "She refused to become a snitch against her client for the government, and that is something she is proud of." *Id.*

103. The breadth of federal criminal law gives prosecutors substantial discretion subject to minimal accountability. See generally Richman, *Federal Criminal Law*, *supra* note 56 (discussing prosecutorial power provided by a substantive sweep of federal criminal law). For a discussion on lack of accountability of federal prosecutors, and risk of enforcement based on invidious stereotypes, see Richman, *supra* note 58.

104. See Indictment at 9-10, 12-13 (accusing Stewart of conspiring with Sheikh Abdel Rahman and others to provide material support to IG).

105. See *United States v. Reid*, 214 F. Supp. 2d 84, 95 (D. Mass. 2002) (commenting that the Stewart indictment will have a chilling effect); J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACKLETTER L.J. 129, 136 (2002) (discussing the possibility of a chilling effect on defense attorneys); Hentoff, *supra* note 5 (quoting Professor Jonathan Turley who stated that the indictment could "create a huge, chilling effect . . . on attorneys approached by highly controversial clients to represent them").

106. A jury also convicted Sheikh Abdel Rahman of soliciting an attack on United States military installations and the murder of Egyptian President Mubarak. *United States v.*

Sheikh and his co-defendants of these charges.¹⁰⁷ The court sentenced the Sheikh to a term of life imprisonment plus sixty-five years.¹⁰⁸

After Sheikh Abdel Rahman's conviction, the Secretary of State designated his organization, the Islamic Group, as a terrorist organization under the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁰⁹ The United States Bureau of Prisons became concerned that the Sheikh, during his incarceration, would continue to communicate with members of the Islamic Group still at large for the purpose of conspiring to commit additional violent crimes.¹¹⁰ To guard against this risk, the Bureau of Prisons invoked its authority under federal regulations to impose SAMs on the Sheikh.¹¹¹ These measures prohibited the Sheikh "from having contact with other inmates and others . . . that could reasonably foreseeably result in the inmate communicating information (sending or receiving) that could circumvent the SAM's intent of significantly limiting the inmate's ability to communicate (send or receive) terrorist information."¹¹² As of April 1999, the conditions also barred the Sheikh from communicating with

Rahman, 189 F.3d 88, 103 (2d Cir. 1999) (per curiam). Sheikh Abdel Rahman was both graphic and insistent in his urgings regarding Mubarak's assassination, which was to take place during a visit of the Egyptian President to New York. *Id.* at 108. The Sheikh advised one of his co-defendants to "make up with God . . . by turning his rifle's barrel to President Mubarak's chest, and killing him." *Id.* at 117. He gave similar counsel to another co-defendant, suggesting that he "[d]epend on God. Carry out this operation. It does not require a fatwa You are ready in training, but do it. Go ahead." *Id.*

107. *Id.* at 103. These convictions were upheld on appeal. *Id.*

108. *Id.* at 148 n.26.

109. Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650 (Oct. 8, 1997).

110. In November 1997, after the Sheikh's conviction, the Islamic Group claimed responsibility for the attack in Luxor, Egypt that resulted in the shooting or stabbing deaths of sixty-two people. It stated that the attack was designed to bring about the Sheikh's release. Indictment at 5-6. In addition, the Government has asserted that it has evidence demonstrating that the Sheikh's son, Mohammed Abdel Rahman, named as a co-conspirator but not indicted in the Stewart case, Indictment at 15, sought to secure the Sheikh's release by proposing a plane hijacking to Osama bin Laden, see Judith Miller, *Traces of Terrorism: The Sheikh; Sheikh's Son and bin Laden Spoke of Plots, Officials Say*, N.Y. TIMES, May 18, 2002, at A11. Moreover, according to the Government, Stewart's translator and co-defendant Mohammed Yousry told the Sheikh during an attorney interview in 2000 that the attack on the U.S.S. Cole was also designed to put pressure on the United States to free the Sheikh. Benjamin Weiser, *F.B.I. Affidavit Outlines Intent of Attack on Destroyer Cole*, N.Y. TIMES, June 6, 2002, at A20. The evidence at Sheikh Abdel Rahman's trial included a tape of him urging a co-defendant to "find a plan to destroy or to bomb or to . . . inflict damage to the American Army." *Rahman*, 189 F.3d at 117.

111. Worth, *supra* note 53 (explaining some of the attorney-client communications conditions placed on the Sheikh); see also *infra* note 184 and accompanying text (discussing communications conditions).

112. See Indictment at 4.

the media directly or through any third person, including his attorney.¹¹³ Stewart, who had continued to represent the Sheikh, signed an affirmation (for an attorney, the equivalent of an affidavit under oath) indicating that she agreed to abide by these conditions.¹¹⁴

The indictment charges that Stewart provided “material support” to a terrorist organization by willfully violating the SAMs that she had agreed to observe and continued to conduct communications with Sheikh Abdel Rahman regarding the violent activities of the Islamic Group.¹¹⁵ For example, in May of 2000, the Sheikh dictated letters to Stewart’s translator in the lawyer’s presence withdrawing support for a previously agreed-upon cease-fire.¹¹⁶ Stewart also issued a statement to the media to that effect.¹¹⁷ In another instance, the Government alleges that Stewart knowingly facilitated communication with Abdel Rahman about a fatwah the Sheikh endorsed, directing members of the Islamic Group “to kill [Jews] wherever they are.”¹¹⁸

113. *Id.* at 4-5.

114. *Id.* at 5. Stewart does not dispute that she signed the affirmation. *See id.*

115. *Id.* at 7, 11-12.

116. *Id.* at 12. The Government alleges that Stewart pretended to be interviewing the Sheikh by making random comments and taking copious notes, to conceal from prison guards the Sheikh’s dictation of the letter. *Id.* Government officials assert that their tapes of Stewart’s meetings with Sheikh Abdel Rahman indicate that Stewart bantered about her routine with the Sheikh and her translator, Yousry, as they spoke in Arabic, prompting her translator to tell the Sheikh, “She is saying, Your Eminence, that she can get an award for her acting.” *See Weiser, supra* note 110.

117. Indictment at 15; *see also* BBC Summary of World Broadcasts, *Lawyer Denies Islamic Group Has Withdrawn Backing for Truce* (June 24, 2000) (quoting Egyptian lawyer for Islamic Group faction as disputing Lynne Stewart’s report that Sheikh Abdel Rahman had withdrawn his support for the cease-fire).

118. Indictment at 16. One can read the indictment to suggest that Ahmed Abdel Sattar, a co-defendant of Stewart’s whom the Government alleges helped coordinate the Islamic Group’s terrorist activities, was initially concerned that Stewart would deny that the Sheikh had issued the fatwah on killing Jews. *See id.* Stewart’s translator allegedly told her that Sattar, who had “ghost-written” the fatwah and placed it on a website operated by another co-defendant, did not wish her to issue such a denial. *Id.* In a subsequent attorney phone call, Sheikh Abdel Rahman allegedly told Yousry that he did not want a denial issued, because, he said of the fatwah, “it is good.” *Id.*

The indictment also argues that “material support” includes an alleged agreement between Stewart and Sattar to falsely state that the Sheikh was being denied medical care. According to the Government, both Stewart and Sattar acknowledged in their conversation that the Sheikh was voluntarily refusing to take insulin as a treatment for his diabetes. *Id.* at 18-19. This particular allegation seems both tangential to the Government’s core case and legally insufficient to make out a claim of material support. *See infra* notes 175-180 and accompanying text (analyzing the legal basis for the indictment).

The indictment also contains charges based on Stewart’s violations of the SAMs governing communication with Sheikh Abdel Rahman. It charges that Stewart, in signing the affirmation regarding communication conditions but engaging in a pattern of violation of those conditions, engaged in a conspiracy to defraud the United States. Indictment at 22-23. Furthermore, the indictment charges that Stewart made false statements to the govern-

III. SHIFTING ROLE BOUNDARIES: THE PROBLEM OF TERRORIST AUTHORIZATION

The indictment in the *Stewart* matter reflects the shifting boundary in terrorism cases between positional and operational solidarity. Positional solidarity merges into operational allegiance when public articulation of a client's position, such as the announcement that Sheikh Abdel Rahman had withdrawn his support for the Islamic Group's cease-fire,¹¹⁹ provides guidance for future acts of violence. This merging of public pronouncements and tactical directives occurs in the signaling behavior that we can call "terrorist authorization."

Signaling is a way of overcoming collective action problems.¹²⁰ It entails the intentional or tacit sharing of understandings and expectations through cues and general pronouncements in situations that discourage more explicit forms of communication.¹²¹ Signaling behavior is particularly useful in terrorist organizations characterized by secrecy, rigorous religious beliefs, and ethnic or religious hatred.¹²²

In groups with strong religious commitments, the authorization of proposed violence by clerics or other opinion leaders is a signal that cancels adherence to nonviolent norms.¹²³ A general authoriza-

ment by affirming that she would abide by the communication conditions. *Id.* at 23-24. Stewart has pleaded not guilty to all of the charges. See Hurtado, *supra* note 5.

119. See Hentoff, *supra* note 5.

120. See Gillette, *supra* note 48, at 835 (noting that some people have garnered enough stature to effectively signal a new norm that they believe to be superior to the existing norm); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 785-89 (1998) (using the signaling theory to discuss ways in which the state encourages racial or ethnic discrimination when such practices are not the existing norm).

121. See Posner, *supra* note 120, at 767 (explaining that symbolic behavior can signify adherence to, or rejection of, accepted norms).

122. See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623, 654-55 (1998) (discussing methods that ethnic activists use to "ethnify" and therefore solidify support for their norm).

123. See HEYMANN, *supra* note 42, at 99 (asserting that "[s]peeches or writings by charismatic leaders urging political violence can provide the battering ram of encouragement a potential terrorist needs to take himself past the wall of social condemnation to a willingness to commit violent acts"); HOFFMAN, *supra* note 42, at 94 (stating that "[r]eligion . . . imparted via clerical authorities claiming to speak for the divine—therefore serves as a legitimizing force. This explains why clerical sanction is so important to religious terrorists and why religious figures are often required to 'bless' (i.e., approve or sanction) terrorist operations before they are executed.").

Islam, for example, has a strong tradition of nonviolence that terrorists have sought to erase with a revisionist account of sacred texts. See JOHN L. ESPOSITO, *UNHOLY WAR: TERROR IN THE NAME OF ISLAM* 20, 32 (2002) (noting Islamic strictures against killing noncombatants, yet relating how Osama bin Laden issued a fatwah "allowing the killing of innocent people" even though he lacked the religious authority to do so); Kanan Makiya & Hassan Mneimneh, *Manual for a 'Raid'*, N.Y. REV., Jan. 17, 2002, at 18 (citing a recent statement by mainstream Muslim clerics that, "Islam provides clear rules and ethical norms that forbid

tion of violence by a cleric also disseminates instructions for terrorist activity without attracting unwanted attention from law enforcement authorities. To preserve secrecy, terrorist enterprises such as the Islamic Group often have a decentralized command structure in which leaders delegate operational planning to isolated cells.¹²⁴ A public statement such as, "The gates of resistance are open totally,"¹²⁵ is the trigger operatives need to begin planning actions.¹²⁶ A broad authorization suffices because such organizations are indiscriminate in their targets, aiming not at particular individuals but at any and all persons of a particular nationality or religion.¹²⁷ Examples of such group

the killing of noncombatants, as well as women, children, and the elderly . . ." and contrasting Al Qaeda's training manual which instructs followers to "kill Americans . . . whenever and wherever they find [them]").

Jewish terrorists, such as the late Rabbi Meir Kahane, sought the same revisionist result. See HOFFMAN, *supra*, at 101 (noting that Kahane "openly called upon the Israeli government to establish an official 'Jewish terrorist group' whose sole purpose would be to 'kill Arabs and drive them out of Israel and the Occupied Territories'").

124. See Brian M. Jenkins, *The Organization Men: Anatomy of a Terrorist Attack*, in *HOW DID THIS HAPPEN?* 1, 9 (James F. Hoge, Jr. & Gideon Rose eds., 2001) (discussing the importance of compartmentalization in Al Qaeda operations, including the September 11 attacks); cf. SEBASTIAN DE GRAZIA, *MACHIAVELLI IN HELL* 9 (1989) (discussing Machiavelli's view that conspiracies fail when they disseminate information too widely among participants).

125. A key political leader of Hamas recently acknowledged that he used this phrase to trigger suicide bombings. Joel Brinkley, *Arabs' Grief in Bethlehem, Bombers' Gloating in Gaza*, N.Y. TIMES, Apr. 4, 2002, at A1. The leader noted that the military leaders hear this authorization, "and they listen because we are the political leaders." *Id.*

126. *Id.* Courts have expanded the ability of the legal system to reach public statements that threaten harm. The Ninth Circuit Court of Appeals has recently held that the First Amendment does not protect graphic and negative public descriptions of particular individuals that are meant to intimidate, where the speaker could reasonably foresee that the subject of the descriptions would interpret them as a "serious expression of intent to inflict bodily harm." See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002) (en banc) (ruling that circulating "Wanted Posters" of doctors who performed abortions and posting their names on website entitled the "Nuremberg Files" constituted a "true threat" outside the ambit of the First Amendment); *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997) (holding that publishing an instructional book on murder that aids and abets a specific murder is not protected speech under the First Amendment).

While a terrorist authorization does not involve threats to particular individuals, it does constitute a direction to persons related to the speaker to take action. Cf. *Planned Parenthood*, 290 F.3d at 1076 (rejecting a contention that the true threat doctrine requires a speaker's control of those who could harm the subject of the threat). In this sense, a terrorist authorization is much closer to conduct punishable under conspiracy and other traditional criminal law doctrines. This is particularly true where, as in the Stewart case, the speaker is the leader of a group designated by the government for commission of terrorist acts, and is at the time of the authorization imprisoned after being convicted of conspiracy to commit such acts. See Indictment at 2-4 (describing the circumstances surrounding Sheikh Abdel Rahman's imprisonment).

127. See HOFFMAN, *supra* note 42, at 94-95.

targeting include Sheikh Abdel Rahman's fatwah to kill Jews or Rabbi Meir Kahane's urging of his followers in the Kach group to kill Palestinians.¹²⁸

The "signaling" account of the transformation of positional into operational solidarity nevertheless raises clear problems with both the First Amendment and our typical understanding of the lawyer's role. The expression of political "positions" is after all what the First Amendment protects. Under the First Amendment, the expression of a position supporting or condoning violence is generally protected, unless the government can prove that the speaker has the specific intent to incite imminent illegal activity and such incitement is likely to produce the desired action.¹²⁹ For example, the state could not prosecute a speaker who shouts, "Death to Israel!" despite the speaker's indication that she would approve of violent activities.¹³⁰ Generally, a lawyer who echoed these sentiments, speaking on her own or on behalf of a client, would similarly receive First Amendment protection.¹³¹ Any other result would constrain the flow of ideas and opinions that the framers deemed crucial to democratic self-governance.¹³²

This does not mean, however, that the First Amendment precludes limits on the authorization of violence or terrorist activity. Statements preceding acts of violence can constitute incitement, if the speaker intended violence to result and violence was an imminent and likely consequence of her statements.¹³³ Moreover, the person issuing the authorization can be so enmeshed in the planning of a particular attack that he becomes a part of a criminal conspiracy. This was the case in Sheikh Abdel Rahman's conviction on charges of conspiring to

128. See *id.* at 100-01. The Kach group has recently been implicated in a plot to bomb a Palestinian girls' school in East Jerusalem. See John Kifner, *Israel Arrests Settlers It Says Tried to Bomb Palestinians*, N.Y. TIMES, May 19, 2002, § 1, at 10. Ironically, one of Sheikh Abdel Rahman's co-defendants, Sayyid Nosair, whom William Kunstler had successfully defended on murder charges in state court, was convicted of conspiracy in the federal trial for his role in the assassination of Kahane. See *United States v. Rahman*, 189 F.3d 88, 148 (2d Cir. 1999) (*per curiam*).

129. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*).

130. See *id.*

131. See *id.* Lynne Stewart, for example, could not be prosecuted for her qualified endorsement of violence in 1995. See *supra* notes 44-45 and accompanying text (discussing Stewart's distinction between "directed" and "anarchistic" violence and her approval of directed violence). Because her comments were so abstract, the court should also limit their use as evidence in her pending case. See *infra* notes 198-200 and accompanying text (analyzing evidentiary issues stemming from Stewart's prior public remarks on violence).

132. See *Brandenburg*, 395 U.S. at 448-49.

133. See *id.* at 447.

bomb New York City landmarks.¹³⁴ Attorney Lynne Stewart raised the First Amendment without success, in the face of evidence on tape demonstrating the Sheikh's participation in the planning process.¹³⁵

In addition, when the government designates an entity such as the Islamic Group or Rabbi Kahane's Kach group as a terrorist organization because of its track record of violence against civilians or other terrorist activity, federal prohibitions of "material support" for such groups can regulate assistance in communicating terror authorizations.¹³⁶ Finally, the government can limit the communications of prisoners convicted of committing terrorist acts, as long as it tailors those limitations to avoid unnecessary interference with the attorney-client relationship.¹³⁷

IV. REGULATING ROLE BOUNDARIES IN THE REPRESENTATION OF ACCUSED TERRORISTS

The material support and prisoner communication limits demarcate the boundary between a lawyer's positional and operational solidarity with clients. The validity and clarity of that boundary in these two contexts is central to analysis of the regulation of lawyers representing persons accused of terrorist activity. This section addresses those issues, and concludes with an examination of a crucial evidentiary matter: the use, if any, that the government can make of an attorney's prior statements of positional support for violence.

A. *Material Support*

Terrorist authorizations engender violence because they are not merely speech in the arena of public debate. Terrorist authorizations tread the boundary of speech and conduct.¹³⁸ Government efforts to reach this type of conduct necessarily trigger tension with the First Amendment and other constitutional guarantees such as the Sixth

134. See *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999) (per curiam).

135. See *id.* at 114-18 (holding that the federal seditious conspiracy statute, 18 U.S.C. § 2384, does not violate the First Amendment). The court acknowledged that, "laws targeting 'sedition' must be scrutinized with care to assure that the threat of prosecution will not deter expression of unpopular viewpoints by persons ideologically opposed to the government." *Id.* at 116. However, the court concluded, "the [g]overnment, possessed of evidence of conspiratorial planning, need not wait until buildings and tunnels have been bombed and people killed before arresting the conspirators." *Id.*

136. See 18 U.S.C. § 2339A(a) (Supp. 2002).

137. See Bureau of Prisons, General Management and Administration, 28 C.F.R. § 501.3 (2002).

138. See *supra* notes 129-134 and accompanying text (explaining that speech with the intent to threaten harm can be reached by the courts without violating the First Amendment).

Amendment right to counsel. The nesting of the attorney-client relationship within constitutional protections ensures that such tensions will permeate efforts to regulate lawyers representing accused or convicted terrorists.¹³⁹ However, when lawyers stray from tasks necessary for representation, their conduct enters the realm of material support for terror in which constitutional protections have far less applicability.

In the terrorism context, speech becomes conduct through interaction with an organizational infrastructure built to respond to the authorization.¹⁴⁰ Congress has sought to disrupt this infrastructure by prohibiting "material support" for certain organizations that the government has identified as engaging in terrorist activity.¹⁴¹ To discern whether the material support prohibition can regulate lawyers' assistance in the communication of authorizations of indiscriminate terrorist activity, this section analyzes two interrelated issues: whether the prohibition is consistent with First Amendment protections, and whether the terms of the prohibition are unconstitutionally vague.

1. *Material Support and the First Amendment.*—Federal law prohibits the provision of "material support" to an organization previously designated as a terrorist organization by the Secretary of State.¹⁴² To designate an organization, the Secretary of State must find that the organization has engaged in terrorist activity.¹⁴³ Terrorist activity may, as in the case of the Islamic Group, Hamas, or Kach, include lethal attacks on civilians.¹⁴⁴ Material support includes funding "training," "expert advice or assistance," "communications equipment," "personnel," "transportation," and "other physical assets."¹⁴⁵

139. See Green, *supra* note 84, at 328 (discussing the tension between the norms of the legal profession and a lawyer's criminal conduct within the context of the attorney-client relationship).

140. Cf. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002) (en banc) (explaining that speech can fall outside the First Amendment protection if a reasonable speaker believes the listener will consider the statement a threat).

141. See 8 U.S.C. § 1189 (Supp. 2002) (providing authority to classify an organization as a foreign terrorist organization); 18 U.S.C. § 2339A(a) (Supp. 2002) (making it a federal offense to provide material support to terrorists).

142. 18 U.S.C. § 2339A(b).

143. See 8 U.S.C. § 1189(a)(1) (granting the Secretary of State the power to designate an organization as a foreign terrorist organization).

144. 8 U.S.C. § 1182(a)(3)(B)(iv)(I). The Secretary of State designated the Islamic Group a terrorist organization in October 1997. Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650 (Oct. 8, 1997).

145. See 18 U.S.C. § 2339A(b). Funding includes "currency or monetary interests or financial securities, [and] financial services." *Id.* Material support also includes providing "lodging, . . . false documentation or identification, . . . facilities, weapons, lethal sub-

Courts have employed a form of intermediate scrutiny to determine that the material support prohibition is an incidental restriction that does not violate the First Amendment.¹⁴⁶ They have noted that the material support prohibition clearly implicates an important governmental interest: cutting off access to financial, technical, and human capital by transnational organizations that engage in terrorist activity.¹⁴⁷ The material support prohibition also does not target protected political speech—it does not bar praise of terrorist activity,¹⁴⁸ but only the conduct involved in offering material aid to organizations that engage in such activity.¹⁴⁹ Finally, the investigational and informational challenges to direct regulation posed by the transnational dimension of terrorist organizations make the prohibition of material support necessary.¹⁵⁰ The difficulty of enforcing direct prohibitions against terrorist acts on a transnational scale suggests that a ban on material support may be crucial to deter future violence.¹⁵¹

stances, [and] explosives". *Id.* Excepted from the definition of material support are "medicine or religious materials." *Id.* The ban on "expert advice or assistance" was added as part of the USA Patriot Act in the Fall of 2001. USA Patriot Act, Pub. L. No. 107-56, § 806(2)(B), 115 Stat. 272, 377 (codified at 18 U.S.C. § 2339A(b) (Supp. 2002)). This provision is not at issue in the Stewart case, although it may become relevant in future cases. *See infra* notes 169-174 and accompanying text (discussing "expert advice or assistance" and other statutory terms).

146. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026-27 (7th Cir. 2002); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135-36 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001); *see also* Neuman, *supra* note 42, at 329-30 (concluding that the material support prohibition likely complies with the First Amendment). *But see* Cole, *supra* note 51, at 205-06 (arguing that material support prohibition violates freedom of association).

147. *Humanitarian Law Project*, 205 F.3d at 1135-36. Congress took care to explain its compelling interests in controlling terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(6), 110 Stat. 1214, 1247 (presenting Congress's finding that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations"); 142 CONG. REC. S3453, S3464 (April 17, 1996) (statement of Sen. Brown) (asserting that the material support provisions will allow the government to "begin to crack down on the use by terrorist groups of international financial institutions and front companies").

148. *Humanitarian Law Project*, 205 F.3d at 1133. The statute also preserves the right of any person in the United States to criticize policies of the United States government and regimes, such as President Mubarak's in Egypt, that lend support to those policies. *See id.*

149. *Id.* at 1136-37.

150. *See* Neuman, *supra* note 42, at 330-31.

151. Professor Neuman explains:

Foreign organizations differ from domestic organizations in the degree to which the federal government has the capacity to control their actions directly. The United States has limited ability to enforce anti-terrorist legislation against foreign organizations that are based in countries with which the United States has amicable relations, and even less ability to enforce it against organizations that are based in hostile countries.

Id. at 331.

The transnational element has also led courts to uphold the material support prohibition in cases where there is no apparent nexus between the unit of the designated organization that received support and the killing of civilians or commission of other terrorist acts.¹⁵² According to courts, Congress could reasonably find that the transnational scale and serpentine accounting of terrorist organizations make it impossible to accurately trace human or financial capital.¹⁵³ Under the circumstances, courts have ruled, Congress could bar all contributions as a prophylactic measure.¹⁵⁴

Since the communications alleged in the Stewart indictment concern the killing of civilians, material support of such core terrorist activity is *a fortiori* outside the scope of the First Amendment.¹⁵⁵ The material support prohibition could constitutionally apply to discussion, public or private, by members of a designated organization or those in their employ or under their control about operational issues, such as the status of a "cease-fire."¹⁵⁶ It would also cover public declarations like Sheikh Abdel Rahman's fatwah that authorized violence against specific groups, such as Americans, Jews, or Palestinians.¹⁵⁷

2. *Material Support, Human Capital, and the Vagueness Doctrine.*—

Even if a prohibition of material support is consistent with First Amendment rights, the terms of the prohibition may be unconstitutionally vague. Due process requires that a statute be "sufficiently clear so as to allow persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited.'"¹⁵⁸ A statute containing terms that are too vague to pass this test does not provide adequate notice to the public.¹⁵⁹ It also may chill the exercise of fundamental rights, such as those guaranteed by the First Amendment, and may en-

152. See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002) (stating that Congress narrowly tailored the designation process for "terrorist organizations" and prohibition of funding rather than membership in such organizations).

153. *Id.* at 1027; *Humanitarian Law Project*, 205 F.3d at 1136. In addition, courts have reasoned that putatively "humanitarian" projects of designated organizations, such as special aid to the families of suicide bombers, can materially facilitate terrorist acts. *Humanitarian Law Project*, 205 F.3d at 1136.

154. See *Boim*, 291 F.3d at 1027; *Humanitarian Law Project*, 205 F.3d at 1136.

155. *United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999) (per curiam) (upholding a prohibition on speech that criminalizes advocacy of specific acts of force against the United States).

156. See *id.*

157. *Id.*

158. *Humanitarian Law Project*, 205 F.3d at 1137 (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998)).

159. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

courage arbitrary enforcement.¹⁶⁰ Given the importance of legal representation for the viability of constitutional rights,¹⁶¹ possible interference with legal representation should trigger a searching inquiry on vagueness grounds.

Vagueness analysis has centered on the statutory terms in the material support prohibition that deal with the provision of some forms of *human capital*.¹⁶² The provision of human capital, such as expertise, is not, in principle, distinct from the provision of financial support or tangible items such as explosives.¹⁶³ Terrorist organizations need services and expertise as much as they need financial support.¹⁶⁴ A ban on the provision of various forms of human capital thus serves the legislature's purpose of disrupting the activities of terrorist organizations.¹⁶⁵ However, to pass muster under a vagueness analysis, a statute should yield a reasonably clear construction of prohibited conduct, including: (1) the nature of the human capital, and (2) the relationship between contributors of human capital and the designated organization.¹⁶⁶ If the statute is not susceptible to a clear construction, courts will use the vagueness doctrine to ensure that the statute does not chill protected activity.¹⁶⁷

Consider first a term added to the definition of "material support" in 2001: expert advice or assistance.¹⁶⁸ Congress clearly could prohibit a wide range of expert advice or assistance, including assistance on munitions or logistics. However, expert advice or assistance

160. *Id.*

161. See *NAACP v. Button*, 371 U.S. 415, 427 (1963) (holding that the First Amendment prohibits application of anti-solicitation rules to lawyers seeking plaintiffs in litigation to establish civil rights).

162. Courts may strike down an entire statute as void-for-vagueness, or hold that one or more of its terms are vague as applied. Courts have been unwilling to invalidate the material support provision as a whole on vagueness grounds, reasoning that its core prohibition on financial support provides sufficient clarity. See *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1201 (C.D. Cal. 1998) (holding in relevant part that only the AEDPA terms "training" and "personnel" were impermissibly vague), *aff'd*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001). Presumably for the same reasons, the terms dealing with specific, tangible commodities, such as "explosives," have not been the subject of vagueness challenges.

163. See generally Margulies, *supra* note 37 (discussing the importance of human and social capital to organizational development).

164. Cf. 18 U.S.C. § 2339A (Supp. 2002) (defining material support as currency or monetary instruments, expert advice or assistance, and personnel).

165. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301, 110 Stat. 1214, 1247 (asserting that Congress's purpose in enacting AEDPA was to prevent resources and support from going to foreign terrorist organizations).

166. See *Humanitarian Law Project*, 9 F. Supp. 2d at 1201.

167. *Id.*

168. 18 U.S.C. § 2339A(b).

could also include: a lawyer litigating whether the government should designate a group as a terrorist organization, defending the group's leader against criminal charges, or challenging the conditions of confinement for a convicted organizational official.¹⁶⁹ Such an expansive definition would undermine First and Sixth Amendment protections, and mandate a solidarity with the state that is inconsistent with the lawyer's role in a democracy. Courts should respond to this kind of governmental overreaching by finding the statute unconstitutionally vague as applied.¹⁷⁰

Similarly, the term "personnel," which constitutes prohibited material support under the AEDPA, would be vague if applied to persons who merely advocate views similar to those of a terrorist organization.¹⁷¹ A person who publicly declares, "I support the goals and methods of Kach," but has no functional role in the organization, could be considered "personnel" in the broadest sense.¹⁷² This person is expressing a viewpoint protected under the First Amendment. In contrast, the Constitution would allow the government to apply the

169. One allegation in the indictment involves representations by Stewart and her co-defendants regarding the Sheikh's confinement. According to the Government, Stewart counseled Sattar in a telephone conversation that it was "safe" to misrepresent to the public that prison administrators were denying medical care to the Sheikh, while they knew that in fact the Sheikh was refusing insulin for his diabetes. Indictment at 18. The Government argues that this alleged "[d]issemination of [a] [f]alse [c]laim" was an attempt to spread propaganda, and thus constituted material support of a terrorist organization. *Id.* at 10-11, 18-19. Even taking the Government's allegations as true, vagueness problems counsel strongly against criminalizing this kind of conduct. The Sheikh's confinement is clearly a matter of public interest. Criminalizing statements about it, even willfully false statements, would have the same chilling effect on free expression as criminalizing libel or slander. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth"). Americans learned long ago, during the heyday of the Alien and Sedition Acts, that this was a bad idea. Since the alleged misrepresentations were not under oath, perjury, or a related charge is also not viable. However, such statements might be an appropriate subject for professional discipline. See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (1983) (defining "misconduct" to include behavior "involving dishonesty, fraud, deceit or misrepresentation").

170. Compare *Pennsylvania v. Stenhach*, 514 A.2d 114, 116 (Pa. Super. Ct. 1986) (holding a state statute criminalizing "hindering prosecution" unconstitutionally vague as applied to lawyers that retained possession of weapon given to them by a client who had allegedly used the weapon in commission of a crime), with *United States v. Cueto*, 151 F.3d 620, 630-31 (7th Cir. 1998) (upholding the conviction of a lawyer for obstruction of justice because he filed lawsuits to hinder the investigation of his client).

171. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001).

172. *Id.*

term "personnel" to an individual employed by Kach or under its control who knowingly assists the organization.¹⁷³

Lawyers who use their professional status to facilitate and conceal the communication of terrorist authorizations constitute "personnel." Acting as a clandestine channel for such information connotes a descent into the realm of operational solidarity well removed from the lawyering tasks of drafting, argument, direct and cross-examination, and even counseling that the Constitution protects.¹⁷⁴ In Stewart's

173. Since the "direction or control" standard matches the dictionary definition of "personnel," the statute arguably incorporates this construction by implication. See II THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2172 (Lesley Brown ed., 1993) (defining personnel as "people employed in an organization . . . or engaged in a service or undertaking"). But see Humanitarian Law Project v. Reno, No. CV 98-1971 ABC (BQRx), 2001 U.S. Dist. LEXIS 16729, at *35-37 (C.D. Ca. Oct. 3, 2001) (arguing that the "direction or control" standard in the United States Attorney's Manual is insufficient to cure vagueness as applied). As with "expert advice or assistance," courts should not permit application of the term "personnel" to persons engaged in certain protected activities, such as legal representation in criminal proceedings.

174. An attorney in this situation might seek to argue that her role as a counselor required her to stay the course, even as her client engaged in discussions involving the authorization of violence against innocent persons. On this view, a lawyer must be "in the room" when the client discusses ongoing illegal activity to persistently advise the client not to so engage. A lawyer might even consider mounting a necessity defense, arguing that her own illegal acts were necessary to temper the violent proclivities of her client and his associates.

The facts in the Stewart case offer only modest support for such an account. The Government does acknowledge that in March 1999 Stewart assisted Abdel Rahman in issuing a statement from jail *in support* of a cease-fire. Indictment at 12. Unfortunately, according to the indictment and the public record, Stewart subsequently used her access to Sheikh Abdel Rahman to help communicate that he had changed his mind. *Id.* at 14-16. Indeed, reports suggest that Stewart, through release of the Sheikh's position, took it upon herself to intervene on the side of violence in an internal Islamic Group debate, in which many group members in Egypt favored continuing to work with "civil society" to reform the government. See BBC Summary of World Broadcasts, *supra* note 117.

The Government also alleges that Stewart's role as a conduit for information about terrorist activities to and from the Sheikh involved providing material support in the form of "communications equipment" and "transportation." Indictment at 11-12. The Government asserts that Stewart made communications equipment available to the Islamic Group when she conducted telephone calls which featured discussion of terrorist activity. *Id.* The Government further asserts that Stewart provided transportation when, according to their allegations, she brought the translator Yousry with her to Minnesota to see the Sheikh in federal prison for the purpose of exchanging information about terrorist activity. *Id.* at 9.

Citing vagueness, Stewart has moved to dismiss, *inter alia*, the portions of the indictment charging her with providing "communications equipment" and "transportation," as well as "personnel" to the Islamic Group. See Defendant's Memorandum of Law Supporting Motion to Dismiss, United States v. Sattar, 02 CR 395 (S.D.N.Y. 2003), available at www.lynnestewart.org. The vagueness challenge to the first two charges mentioned should fail for the same reasons as the challenge to the charge of providing "personnel." See *supra* notes 171-173 and accompanying text (discussing why "personnel" is not vague as applied in the Stewart case). Regarding each charge, it would be "sufficiently clear . . . to . . . 'persons of ordinary intelligence'" that an individual under the direction or control of a

case, for example, the Government alleges that Stewart facilitated phone calls, written communications, and meetings regarding ongoing terrorist activity by camouflaging these exchanges as attorney-client interaction.¹⁷⁵ Given the Sheikh's exhaustion of appeals of his conviction, the relationship of these exchanges to any actual legal work performed by Stewart remains unclear.

Stewart's public transmission of Sheikh Abdel Rahman's terror authorization at a news conference similarly involves an effort to shelter communications about ongoing illegal acts under the advocate's rubric.¹⁷⁶ The government could apply the material support prohibition to a public declaration by a leader of a designated terrorist organization offering guidance to group members about future illegal activity.¹⁷⁷ The mere fact that the lawyer, due to the leader's unavailability, took up the mantle herself does not change the underlying analysis.¹⁷⁸ To hold otherwise would allow terrorist organizations to effectively launder communications by using the lawyer as a public conduit.

B. Conditions for Communication

The preceding analysis regarding the policing of the border between positional and operational solidarity also clarifies rules regarding attorney communication with incarcerated clients. Stewart undertook through an attorney's affirmation to accept conditions that

designated group could not knowingly provide communications modalities, such as telephone calls, or transportation modalities, such as subsidized trips, to members of the organization for the purpose of discussing ongoing violent activity. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (discussing the vagueness standard).

These alleged activities by Stewart raise ethical concerns, as well as issues about criminal culpability. The American Bar Association's Model Rules of Professional Conduct provide that a lawyer "shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983). If the Government can prove that Stewart knew that the communications she arranged entailed discussion of ongoing violence, this evidence also helps establish the requisite level of knowledge under the ethics rules.

175. Stewart allegedly provided the terrorist organization with other "personnel" besides herself. For example, according to the Government, she knowingly allowed Yousry, ostensibly employed as a translator for matters related to the Sheikh's legal representation, to use attorney-client meetings and telephone calls to pass along information about terrorist activities. Indictment at 12-14. Here, as elsewhere, of course, the Government must bear the burden of proof at trial, for example, through demonstrating that Stewart, who does not know Arabic, nonetheless had knowledge of the communications between the Sheikh and the translator Yousry.

176. Indictment at 12-14.

177. *See* 18 U.S.C. § 2339A(a) (Supp. 2002); Brinkley, *supra* note 125 and accompanying text (providing an account of the dynamics of terror authorizations).

178. *See* 18 U.S.C. § 2339A.

precluded communication with third parties or the media.¹⁷⁹ Recently, even more onerous conditions, such as consent to monitoring of attorney-client communications, have been challenged in cases involving imprisoned terrorists.¹⁸⁰ Focusing on operational solidarity offers a workable approach for assessing the validity of these restrictions.

Courts have insisted that conditions that could impair inmates' access to the courts be tailored to legitimate penological interests. If the conditions fit a rational governmental interest not related to suppressing the content of inmate speech, courts will also consider the existence of alternative means of exercising the right available to inmates, the impact of exercise of the right on prison administration, and the availability of less restrictive alternatives for achieving the government's objectives.¹⁸¹ Courts seem most likely to approve attorney-client communication restrictions that reflect an individualized assessment of risks. For example, prison administrators can more readily impose conditions on lawyers or legal workers who "pose[] some colorable threat to security" and on inmates "thought to be especially dangerous."¹⁸² If a restriction, even one concerning the receipt of legal advice, is consistent with prison administrators' assessment of risk, the courts will typically defer to the administrators' expertise.¹⁸³

Prisoners like Sheikh Abdel Rahman, who lead designated terrorist organizations and have been convicted of charges stemming from terrorist activity, are appropriately subject to restrictions on contact and communication. The restrictions on communication with third parties or the media fit the legitimate interest of the government in precluding the inmate's participation in planning or signaling future terrorist attacks.¹⁸⁴ Such restrictions also reflect tailoring, by preserv-

179. See Indictment at 4-5, 23.

180. See Fainaru, *supra* note 82 (discussing lawsuits over government monitoring).

181. *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001).

182. *Procunier v. Martinez*, 416 U.S. 396, 420 (1974).

183. *Shaw*, 532 U.S. at 228-32 (declining to accord special First Amendment protection to prisoner-to-prisoner legal communications).

184. The terrorist organization's claim that it has engaged in attacks to pressure the government to release its leader simply buttresses the case for such restrictions. See Indictment at 5-6 (describing the Islamic Group's statement after the Luxor attack); Weiser & Worth, *supra* note 22 (quoting Stewart's translator and co-defendant, Mohammed Yousry, as telling Sheikh Abdel Rahman that the attack on the U.S.S. Cole was designed to pressure the government to release the Sheikh).

ing the inmate's ability to consult with a lawyer about lawful methods for securing release from incarceration.¹⁸⁵

The government has ample grounds to prosecute lawyers who knowingly and repeatedly violate such lawful restrictions after affirming in writing their willingness to comply. If lawyers regard conditions on communication with incarcerated clients as onerous, they should in a timely fashion contest the validity of the restrictions.¹⁸⁶ Evidence that a lawyer agreed to comply under penalty of perjury,¹⁸⁷ failed to challenge the conditions, and then repeatedly violated her own undertakings in order to assist her client's illegal activity supports an inference that the lawyer's initial affirmation was a false statement.

This kind of specific showing should also be a predicate for government monitoring of attorney-client conversations. The government argues that monitoring is permissible in conjunction with a screening process that would effectively bar access to monitored materials by any prosecutors in the case.¹⁸⁸ However, even with a screening process in place, monitoring will adversely affect the quality and utility of attorney-client communications.¹⁸⁹ Frank exchange, the currency of attorney-client contact, will necessarily suffer if lawyers and clients know the government is listening.¹⁹⁰ For example, consider a client's decision about a matter that could ultimately benefit antiterrorism efforts, such as cooperation with investigators. Clients considering cooperation will be understandably unwilling to discuss this possibility if they believe that the government will learn of their

185. See Bureau of Prisons, General Management and Administration, 28 C.F.R. § 501.3 (2002) (allowing the Director of the Bureau of Prisons to create SAMs to protect against future attacks that create the risk of death or serious bodily injury).

186. See *supra* notes 180-183 and accompanying text (discussing legal standard for administrative restrictions).

187. See 18 U.S.C. § 1001 (Supp. 2002) (making perjury and other false statements a felony). The same evidence supports an inference that the lawyer has engaged in a conspiracy to defraud the government by impeding or impairing the government's ability to control access to a prisoner in federal custody. 18 U.S.C. § 371 (2002) (making it a felony to conspire to defraud the United States).

188. See Fainaru, *supra* note 82. This process, analogous to a law firm's procedures to screen out an attorney who had previously represented a party adverse to the firm's current client, would involve a special team that could not share information from monitoring sessions without a court order. See MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 6 (1983) (discussing ways in which screening can yield an inference that lawyers in a current case are not privy to information about a former client).

189. See Fainaru, *supra* note 82 (reporting that the new SAMs are having a chilling effect on some attorney-client conversations).

190. Lynne Stewart observed that such monitoring has "almost a freezing effect on your ability to defend the person . . . the whole way we operate is to establish a relationship of trust. You want to know everything that happened, and then you decide if the case is defensible or not." Mansnerus, *supra* note 1.

leanings through an audio-taped conversation with their lawyer, rather than through the lawyer's careful presentation of a cooperation agreement.

To the extent that monitoring impairs the lawyer's usefulness to the client in pursuing entirely lawful objectives, it represents the kind of enforced solidarity with the state that regulation in this area must reject. Because of this concern, the mere fact that an inmate is incarcerated pursuant to a conviction for terrorist acts or has a history of aiding terrorist groups is insufficient justification. Monitoring is only appropriate where the government can demonstrate that less severe restrictions, including restrictions on communication with third parties or the media, have failed to prevent the client or lawyer from entering into operational solidarity regarding ongoing illegal acts.¹⁹¹

C. *The Lawyer's Out-of-Court Statements as Evidence*

A final problem is that the government will seek to prove operational solidarity through the lawyer's prior expressions of positional allegiance, such as statements supporting resort to violence. In seeking to use the lawyer's expressed positions against her, the government risks prejudice to the defendant, and intrudes into both the lawyer's efforts to define her professional identity and the domain of political speech usually protected by the First Amendment.¹⁹² Courts' evidentiary rulings should address these concerns.

Prior statements approving of or threatening violence are typically admissible if they are sufficiently specific to establish motive.¹⁹³ In a murder case, courts readily admit into evidence the threat, "The

191. Courts considering conditions imposed on access to counsel in recent terrorism-related cases have split. Two courts apply a reasonableness test and one appeals court allows the government to prohibit attorney-client communication based on the court's minimalist view of the right of the petitioner to contest the alleged facts supporting his detention as an unlawful combatant. *See United States v. Reid*, 214 F. Supp. 2d 84, 92-95 (D. Mass. 2002) (allowing defendant's lawyers and their staffs to consult with third parties solely for the purpose of assisting with the defense); *Padilla v. Bush*, No. 02 Civ. 445, 2002 U.S. Dist. LEXIS 23086, at 112-13 (S.D.N.Y. Dec. 4, 2002) (describing the government's concern that detainee might pass messages to others through his attorney as "conjecture" and "gossamer speculation"); *cf. Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002) (vacating the District Court's order requiring the government to permit communication between counsel and apparent United States citizen detained by the government as an unlawful combatant in Afghanistan); *Hamdi v. Rumsfeld*, No. 02-7330, 2003 U.S. App. LEXIS 198 (4th Cir. Jan. 8, 2003) (declining to permit factual challenge of the government's declaration that detainee was an unlawful combatant).

192. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 1058 (1991) (stating that an attorney's political speech is protected by the First Amendment).

193. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (holding that the First Amendment does not prohibit evidentiary use of speech to show motive or intent).

next time you do that, I'll kill you."¹⁹⁴ Statements about particular groups may be admissible to show a defendant's motive in an alleged hate crime.¹⁹⁵ However, in cases where the government alleges that the defendant's motivation stemmed from political or religious views, admission of such evidence could produce a verdict based on the jury's opinion of those views, not on whether the defendant committed the crime charged.¹⁹⁶

To guard against this risk, courts should carefully circumscribe the use of such "advocacy evidence" in cases involving lawyers' positional solidarity with clients.¹⁹⁷ As we have seen, general statements supporting violence are not uncommon among lawyers who view themselves as defending the unpopular. William Kunstler, in his autobiography, mused at length about how the killing of Rabbi Meir Kahane, himself an advocate of violence, may have been a good thing.¹⁹⁸ Lynne Stewart endorsed violence against oppressive institutions, even as she condemned "anarchistic" violence as ineffective.¹⁹⁹ The use of such statements as part of the government's case-in-chief triggers tensions with the First Amendment and, in the post-September 11 climate, risks substantial prejudice to the defendant.

Courts should generally bow to these concerns and decline to admit generic evidence of positional solidarity with violence as part of the government's case. To admit such evidence, courts should require that the government show an unambiguous nexus between the views expressed and the crime charged. Suppose, for example, that the communications within the Islamic Group that Stewart facilitated had involved the assassination of Egyptian President Mubarak. A court could regard as relevant and probative, and therefore admissible, Stewart's criticism of the Mubarak regime, coupled with her approval of "violence directed at the institutions which perpetuate

194. See *id.*

195. See *id.* at 486-87; *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1083 (9th Cir. 2002) (en banc) (stating that speech does not become inadmissible to show context or intent simply because standing alone it is protected); *United States v. Rahman*, 189 F.3d 88, 117-18 (2d Cir. 1999) (per curiam) (holding that the trial court properly admitted into evidence writings and speeches reflecting hostility toward the United States as proof of motive for a conspiracy to bomb New York City landmarks).

196. The trial court's instructions may help alleviate this concern. See *Rahman*, 189 F.3d at 118 (noting the trial judge's instructions "that a defendant could not be convicted on the basis of his beliefs or the expression of them"). It is not clear, however, that instructions can entirely obviate the risk of prejudice.

197. See *Planned Parenthood*, 290 F.3d at 1111 (Berzon, J., dissenting).

198. See KUNSTLER & ISENBERG, *supra* note 59, at 324 (stating "[i]n assessing the murder of Meir Kahane, I'm not at all sure that it was not a blessing").

199. See Fried, *supra* note 43.

capitalism, racism and sexism, and at the people who are the appointed guardians of those institutions."²⁰⁰

Although Sheikh Abdel Rahman had previously been convicted of seditious conspiracy to murder President Mubarak,²⁰¹ the Government does not allege in the Stewart indictment a fresh plot against the Egyptian President.²⁰² Given this lack of unambiguous nexus, the court should decline to admit evidence of Stewart's views. This approach balances the government's interest in proving the lawyer's operational ties with the need to avoid prejudice to the defendant and preserve the First Amendment protection accorded positional solidarity.

V. LAWYERS' ROLES AND PROSECUTORIAL DISCRETION: THE OUTLOOK FOR THE FUTURE

Striking the proper balance between government interests and civil liberties is crucial in regulating the role of lawyers for persons accused of terrorist activity. Any government action against a lawyer undertaking the representation of unpopular clients can chill commitments essential to democracy. At the same time, the law should prevent lawyers from leveraging their professional status to pursue a course of operational solidarity with terrorism that extends well beyond a lawyer's core functions. By developing a standard to guide prosecutorial discretion, the government can deal effectively with abuses and preserve lawyers' value to their clients and to democratic governance.²⁰³ A fair standard for prosecuting acts of operational solidarity with terrorist activity should focus on: (1) notice to lawyers of possible abuses; and (2) aggravating substantive factors, such as (a) a pattern of wrongdoing, or (b) a clear nexus with violence. The following paragraphs discuss these factors in turn.

A. *Criteria for Prosecuting Operational Solidarity*

1. *Notice.*—The provision of notice that a particular action constitutes a sanctionable offense is a fundamental principle of democracy, expressed in the Ex Post Facto Clause and the due process-based

200. *Id.* (quoting Lynne Stewart). Moreover, if a lawyer who had issued a more general endorsement of violence testified that she deplored violence in all of its forms, the prosecution could clearly use her previous remarks for purposes of impeachment. FED. R. EVID. 801(d).

201. *United States v. Rahman*, 189 F.3d 88, 117-18 (2d Cir. 1999) (per curiam).

202. *See* Indictment at 3.

203. For a discussion of prosecutorial discretion in plea bargaining, see Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1149-81 (1998).

contours of the vagueness doctrine. Courts considering sanctions against lawyers have often paid special attention to this principle, imposing sanctions for actions such as violations of gag orders only after repeated warnings.²⁰⁴ To avoid a chilling effect on lawyers engaged in lawful representation of clients, regulation of operational solidarity with terrorist organizations should accord notice a special place.

Notice to lawyers can be actual or constructive. Actual notice is superior, where practicable, as a method for avoiding unfair surprise that can chill advocacy efforts. For example, after Lynne Stewart's announcement to the media of Sheikh Abdel Rahman's withdrawal of support for the Islamic Group's cease-fire, the best practice for the government may have been to notify Stewart that her conduct contravened both the material support provisions of the AEDPA and the SAMs governing the Sheikh's incarceration, and to inform her that subsequent violations would trigger sanctions.²⁰⁵

In the *Stewart* case, however, the government could justify declining to provide actual notice on grounds of exigency. Such notice could have "tipped" Stewart and her co-defendants to the surveillance of their visits with the Sheikh for which the government had procured a warrant, and jeopardized the broader investigation.²⁰⁶ Furthermore, constructive notice to Stewart was ample, reflected in the clear language of the SAMs barring the Sheikh's direct or vicarious communication with the media,²⁰⁷ and in the designation of the Islamic Group as a terrorist organization that triggered the material support prohibitions of the AEDPA.²⁰⁸ For lawyers seeking guidance after the Stewart indictment about the location of the boundary between positional and operational solidarity, the presence of SAMs or a current

204. See, e.g., *United States v. Cutler*, 58 F.3d 825, 829-31, 837-38 (2d Cir. 1995) (holding that disregard of the district court's repeated warnings showed willful intent of counsel to violate the gag order).

205. Stewart asserts that she received such notice in July 2000 and agreed at that time to comply with the SAMs. See Defendant Lynne Stewart's Notice of Motion for an Evidentiary Hearing for Specific Performance and for Dismissal, at ¶ 12, 02 CR 395 (S.D.N.Y. 2003) (JGK), available at www.lynnestewart.org/motionB.pdf. She further claims that the "consideration" for her agreement to comply with the SAMs was the government's relinquishment of the option to prosecute her. *Id.* Stewart acknowledges, however, that the government did not agree to this in writing. *Id.* If these claims are correct and Stewart lived up to her end of the agreement, then the Government should have declined to charge Stewart, as a matter of prudence if not law.

206. See *Lopez v. United States*, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting) (noting that "the usefulness of electronic surveillance depends on lack of notice to the suspect").

207. See Indictment at 4.

208. Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650 (Oct. 8, 1997).

terrorist designation are indications that caution is appropriate in communications regarding ongoing organizational activities.

2. *Substantive Guides for Discretion.*—

a. *A Pattern of Wrongdoing.*—Despite the notice provided to an attorney, prosecutors should exercise their discretion to decline to prosecute in cases involving isolated acts of operational solidarity. Such acts may be the product of inadvertence or circumstance, and may not reflect the degree of immersion in the client's ongoing terrorist activities that threatens public safety or the integrity of the lawyer's role. For example, if Stewart's only alleged offense had been her announcement regarding the cease-fire, prosecutors may have been best advised to decline to prosecute.

Prosecutors should focus on cases involving a pattern of violations. The existence of a pattern is the best indication that the lawyer's conduct is willful, and warrants attention for the sake of both public safety and the integrity of the legal profession. Requiring a pattern also guards against the possibility that prosecutors will indict lawyers whose alleged criminal conduct is difficult to separate from constitutionally protected activity, such as investigation of a case pending trial that involves communication with members of a designated organization about alleged past acts.

In Stewart's case, a pattern seems to emerge from the conjunction of her media announcement regarding the cease-fire with two additional courses of conduct: (1) her alleged engineering of the passing of messages regarding ongoing violence between the Sheikh and his cohorts during her visits to the Sheikh in federal prison, and (2) her continued provision of personnel to the Sheikh, such as the services of the co-defendant Yousry as a translator, after Yousry's alleged communication to her of a message not to disavow the fatwah directing the killing of Jews.²⁰⁹ If the evidence does not support both of these additional allegations, the charges against Stewart, while legally sufficient to support an indictment, may not constitute an appropriate exercise of discretion.

b. *A Nexus with Acts of Violence.*—Even in the absence of a pattern, however, an act of operational solidarity with terrorist activities should be the subject of prosecution if the evidence demonstrates that the act had a clear connection to a subsequent act of violence.

209. The message about the fatwah confirmed, if there had been any lingering doubt on Stewart's part, that her co-defendants were actively seeking to promote ongoing violence against civilians.

For example, if a terrorist authorization communicated by an attorney was followed immediately by an attack by members of a designated terrorist organization represented by that attorney, prosecution would be appropriate. In Stewart's case, the Government may not be able to demonstrate such a nexus, despite the alleged assertions by Stewart's co-defendant Yousry that the attack on the U.S.S. Cole was designed to build pressure to free the Sheikh.²¹⁰ A nexus with violence is not legally required to prove violations of the AEDPA or the SAMs.²¹¹ Nevertheless, in the absence of a pattern, the government should view a nexus with violence as a threshold criterion for the decision to prosecute.

B. *The Lawyer's Role Redux*

Such a nuanced approach will not materially impinge on the lawyer's constitutional role, and may enhance the lawyer's service to clients accused of terrorist activity. A measured approach creates a safe harbor for lawyers who perform core constitutional tasks, such as the defense at trial of unpopular clients. The investigation, examination, argument, and counseling central to such tasks remains in a realm largely immune from government intrusion. Public aspects of such tasks, including generic expressions of positional solidarity with violence, also receive protection. Moreover, in addition to deterring criminal conduct, measured regulation of the boundary between positional and operational solidarity will also yield benefits for clients.

At their best, lawyers can help clients cope with the fluidity of human events.²¹² In the political sphere in which expressions of positional solidarity issue, coping with transitions requires a repertoire of responses.²¹³ Violence may be a necessary recourse in some dire situations, but it is rarely the only recourse available. Members of the Islamic Group in Egypt understood this when they disputed Stewart's announcement that Sheikh Abdel Rahman had withdrawn his support for the cease-fire, and affirmed their commitment to forging coalitions within civil society.²¹⁴ To the extent that Stewart identified herself with the cause of a transition to democracy within Egypt, her

210. See Weiser, *supra* note 110.

211. See 18 U.S.C. § 2339A (Supp. 2002); Bureau of Prisons, General Management and Administration, 28 C.F.R. § 501.3 (2002).

212. See Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 Nw. U. L. REV. 695, 698 (1994) (articulating the importance of a dialogue between attorney and client).

213. See Margulies, *supra* note 14, at 28-31 (discussing insights of transition theorists).

214. See BBC Summary of World Broadcasts, *supra* note 117.

renewed call for violence on the Sheikh's behalf did little to advance the goal she shared with the organization's members.

A lawyer whose counsel better reflected the constancy of change in politics may have chosen a contrasting course—exploring with the Sheikh the possibilities of peace. If the Sheikh had chosen this path, the lawyer would have aided such an effort. If the Sheikh had declined, the lawyer would have received a clear signal to either withdraw from representation, or else limit her services to matters directly involving the Sheikh's legitimate legal interests, such as collateral attack of his conviction or advocacy regarding conditions of confinement. Even if someone needed to urge the continuing importance of violence, the lawyer's assumption of this role sounds in the key of hubris, rather than professional judgment. Surely, unpopular defendants need their lawyers' judgment as much or more than other clients. By reclaiming this judgment from the seductions of violence, a measured approach to the regulation of operational solidarity serves clients as well as the public interest.

CONCLUSION

The Lynne Stewart case demonstrates that the always troubled border between positional and operational allegiance is particularly difficult to administer in an age of terror. A lawyer who ends up on the operational side can facilitate the mass slaughter of innocents. However, government attempts to regulate attorney ties with clients can impose an equally problematic allegiance: solidarity with the state. These twin risks create a dilemma for the legal system. The lawyer's democratic role in checking government power counsels against unduly intrusive regulation of the attorney's relationship with a client accused or convicted of terrorist activity. Indeed, in light of the risks of regulation, some might favor a *laissez-faire* regime that left such matters to each lawyer's conscience.

The difficulty with a *laissez-faire* regime resides in the close relationship of solidarity's virtues and vices. The classic trap of operational solidarity is set by solidarity's virtues: affective ties to an unpopular client and positional ties to the client's goals of social reform. The trap is sprung when unreflective practice of those virtues leads the lawyer—perhaps incrementally and imperceptibly—to the vice of complicity. Conscience alone may not be a reliable guide in avoiding such risks.

Courts and prosecutors can offer fuller guidance as they interpret and apply recent measures such as prohibitions on material support to terrorist organizations and limits on communication with incarcer-

ated terrorists or terror suspects. Unreflective interpretation could lead to the mirror image of solidarity's vices: intimidation of zealous defenders, blanket surveillance of attorney-client conversations, and other indicia of enforced solidarity with the state. Democracy deserves more care.

A nuanced approach by courts would use the vagueness doctrine to protect core lawyering functions, require individualized showings for surveillance, and exclude prior statements of positional solidarity with violence that lacked a specific connection to the offense charged. Prosecutors would exercise their discretion by providing actual notice of possible violations whenever practicable and focusing on patterns of wrongdoing or a nexus with subsequent violence. A nuanced approach to regulation of the uneasy border between positional and operational solidarity can guard against lawyers' complicity with terror while preserving the independence of lawyers from government coercion.